

**LIBRARY**  
**SUPREME COURT, U. S.**

**TRANSCRIPT OF RECORD**

---

**Supreme Court of the United States**

**OCTOBER TERM, 1953**

**No. 43**

---

**SOUTHERN PACIFIC COMPANY; APPELLANT,**

**vs.**

**PUBLIC UTILITIES COMMISSION OF CALIFORNIA,  
ET AL**

---

**APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA**

---

**FILED APRIL 22, 1953**

**Jurisdiction postponed May 18, 1953**



# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

**No. 43**

**SOUTHERN PACIFIC COMPANY, APPELLANT,**

**vs.**

**PUBLIC UTILITIES COMMISSION OF CALIFORNIA,  
ET AL**

**APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA**

## INDEX

	Original	Print
Proceedings in the Supreme Court of the State of California	1	1
Petition for writ of review and memorandum of points and authorities	1	1
Answer to petition for writ of review	129	121
Answer and brief of the City of Los Angeles and City of Glendale in opposition to issuance of writ of review	193	164
Petitioner's reply to answer of the respondent Public Utilities Commission and to answer and brief of the City of Los Angeles and the City of Glendale	253	205
Supplemental appendix—Opinion and order on Decision No. 47819, dated October 14, 1962	353	285
Order denying petition for writ of review	357	287
Petition for appeal	358	288
Order allowing appeal	360	289
Citation (omitted in printing)	362	
Assignment of errors	363	290
Statement required by Paragraph 3, Rule 12 of the Rules of the Supreme Court (omitted in printing)	367	
Principles for record (omitted in printing)	373	
Clerk's certificate (omitted in printing)	375	
Statement of points to be relied upon and designation of record for printing	377	293
Order postponing jurisdiction	384	294

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1963.

# In the Supreme Court of the State of California

**SOUTHERN PACIFIC COMPANY,**  
a corporation,

*Petitioner,*

vs.

**PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA and R. E. MITCHELL,  
STANLEY, JUSTUS F. CHAMBER, HAROLD P.  
HUIA, KENNETH POTTER and PETER E.  
MITCHELL, as members of and consti-  
tuting said Commission,**

*Respondents.*

## **Petition for Writ of Review with Memorandum of Points and Authorities in Support Thereof**

**E. J. FOULKE,  
BURTON MASON,**  
48 Market Street,  
San Francisco 5, California,

**RANDOLPH KARR,**  
670 Pacific Electric Bldg.,  
Los Angeles, California

*Attorneys for Petitioner.*





## INDEX TO PETITION

	Page
I. Status of the Parties.....	2
II. The Proceedings in Which Decisions Nos. 47420 and 47591 Were Rendered by the Commission.....	3
III. Jurisdiction of the Court.....	6
IV. Specifications of Errors.....	7

## INDEX TO MEMORANDUM OF POINTS AND AUTHORITIES

<b>Foreword</b>	<b>13</b>
 <b>I. The orders of the Commission under challenge herein undertake to allocate to and impose upon petitioner a proportion of the costs of the construction in question greatly in excess of any amounts which would be warranted by the benefits accruing to the petitioner from such construction, and which proportion is in fact wholly unrelated to such benefits; and said orders therefore operate:</b>	
(a) To deprive petitioner of its property without due process or just compensation, and	
(b) To subject petitioner and its facilities to undue, unreasonable, and excessive burdens.....	<b>16</b>
<b>The trend of the Commission's Rulings: the "Barrier Concept," as Opposed to the "Benefit Principle" .....</b>	<b>25</b>
<b>Bases of Apportionment Followed Nationally and in Other States.....</b>	<b>33</b>

Note: The discussion in this subdivision covers also specification of error set forth in the petition as follows: "2d. The Commission's order burdens interstate commerce in violation of the Commerce Clause (Art. 1, Sec. 2, par. 3) of the Constitution of the United States, and the 'National Transportation Policy' enacted by Congress (84 Stat. 599; U.S.C.A. Title 49, before Part 1, Chap. 1). The underpass in question is but one project in several states through which petitioner operates, which states are looking forward to many such projects in the future."



II. Because of Allocating Such Excessive and Unrelated Costs to be Paid by Petitioner, the Commission's Order If Enforced Would Require Petitioner to Subsidize Its Competitors, and to Injure Its Own Business Correspondingly .....	52
III. The Orders of the Commission, If Considered as a Purported Exercise of the Police Power, Are Unjustified and Unreasonable, in that:	
(a) No Material Considerations of Safety of Persons or Property Are Involved, or Shown to Exist, in the Situation to Which Said Orders Are Directed;	
(b) Petitioner Has Not, by Any Act, Action or Omission of Its Own Created or Increased Any Hazard, Inconvenience, Obstruction, or Interference Affecting the General Public, or Those Portions Thereof Who Use the Los Feliz Crossing; Any Such Condition, to the Extent That They May Exist, Having Arisen Out of Circumstances Wholly Beyond Petitioner's Control or Responsibility .....	60
<p>Note: The discussion in this subdivision covers also Specification of Error No. 7 set forth in the petition as follows: "7. The Commission's orders, in apportioning to petitioner 50% of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence."</p>	
IV. The Allocation to Petitioner of 50% of The Cost of Said Construction is Purely Arbitrary, Having No Evidentiary Basis Whatsoever, and Is Wholly Unrelated to Any Consideration or Benefit to Petitioner.....	70
V. The Commission in its Orders and Decisions Herein Has Failed to Find Ultimate Facts on Material Issues, Has Made Findings Not Supported by Any Substantial Evidence, and Further Has Made Findings Contrary to the Evidence, and Thus Has Denied to Petitioner Its Constitutional Rights to Due Process.....	83
(a) The Finding With Respect to Public Safety Is Unsupported by the Evidence, and Such a Finding Is Therefore a Denial of Procedural Due Process.....	83
(b) The Absence of Findings on Material Issues Requires the Decisions Be Set Aside.....	88
Conclusion .....	94

## INDEX TO APPENDIX

EXHIBIT NO.	APPENDIX PAGE
A. Application of the City of Glendale No. 32385 to Public Utilities Commission to Authorize the Construction of a Grade Separation at Los Felix and Apportion the Costs.....	1
B. Order of the Public Utilities Commission Instituting Investigation as to the Necessity of a Grade Separation at Los Felix and the Apportioning of Costs (Case No. 5327) .....	17
C. Decision No. 47420 of the Public Utilities Commission Respecting Application No. 32385 and Case No. 5327.....	19
D. Application of Southern Pacific Company for Rehearing of Decision No. 47420.....	37
E. Decision No. 47597 of the Public Utilities Commission (Order Denying Rehearing and Modifying Decision No. 47420) .....	84
F. Part V of Exhibit No. 2 Entitled in Part "Results of an Engineering Study" (of all parties) Respecting the "Economic Justification for the Separation" (pp. 23-32) .....	86
G. "List of Grade Separations Constructed in California, 1934-1950, Involving Southern Pacific Lines, Showing Apportionment of Costs and Basis Thereof".....	92
H. Summary of State Statutes and Practices in Respect to Cost Allocation.....	98
J. Summary of Facts .....	104



# TABLE OF AUTHORITIES

CASES	Pages
Alabama Public Service Commission v. Southern Railway, 341 U.S. 341; 95 L. ed. 1002.....	88
American Toll Bridge Co. v. Railroad Comm., 12 C.2d 184; 83 P.(2d) 1; Aff. 307 U.S. 486; 83 L. ed. 1414.....	87, 95
Application No. 29369 (Washington Boulevard Case) .....	17, 18, 19, 38, 61, 65, 77
Application of the City of Los Angeles, 37 C.R.C. 784.....	27, 28
Application of the City of San Bernardino, 37 C.R.C. 506 .....	25, 26, 27
Application of the Department of Public Works (Alto Over- pass, etc.), 38 C.R.C. 606.....	30, 31
Application of the Department of Public Works (El Monte Underpass), 38 C.R.C. 612.....	30
Application of the Department of Public Works (Goshen Case), 38 C.R.C. 380.....	29, 30, 72
Application of the Department of Public Works (Madrone Underpass), 38 C.R.C. 425.....	30
Archer v. City of Los Angeles, 19 C.2d 19.....	71
Atchison, T. & S. F. Ry. Co. v. Commerce Comm., 167 N.E. 831; 335 Ill. 624.....	92
A. T. & S. F. Ry. Co. v. Public Utilities Commission, S. F. No. 18671.....	17
Beaumont, S. L. & W. Ry. Co. v. United States, 382 U.S. 74; 75 L. ed. 221.....	92
Bluefield Co. v. Pub. Serv. Comm., 262 U.S. 679; 67 L. ed. 1176 .....	87
Cantrell v. Board of Supervisors, 87 Cal. App.2d 471; 197 P. (2d) 218.....	92
S. H. Chase Lumber Co. v. Railroad Commission, 212 Cal. 691; 300 Pac. 12.....	19
Chi., Mil. & St. P. Ry. Co. v. Minneapolis, 232 U.S. 430; 58 L. ed. 671.....	38
City of Milwaukee v. Railroad Commission, 155 N.W. 948; 162 Wis. 127.....	19
City of San Jose v. Railroad Commission, 175 Cal. 284; 165 Pac. 967.....	18, 19, 25

# TABLE OF AUTHORITIES

v

	Pages
Erie R. Co. v. Public Utility Commissioners, 254 U.S. 394; 65 L. ed. 323.....	38, 39, 40, 41, 42, 49, 50, 61
In Re Erie R. R. Co., 208 N.Y. 486; 102 N.E. 562.....	19
In Re Pacific Gas and Electric Co., 43 C.R.C. 753.....	90
Interstate Commerce Commission v. Parker, 326 U.S. 60; 89 L. ed. 2051.....	51
Kansas City Southern Ry. Co. v. Kaw Valley Drainage Dis- trict, 233 U.S. 75; 58 L. ed. 857.....	45, 46, 48, 49
Laisne v. Cal. St. Bd. of Optometry, 19 C.2d 831; 123 P.2d 457	88
Lehigh Valley R. Co. v. Public Utility Commissioners, 278 U.S. 24; 73 L. ed. 161.....	38, 41, 42, 61, 70
Mahler v. Eby, 264 U.S. 32; 68 L. ed. 549.....	92
Meeker & Co. v. Lehigh Valley R. Co., 236 U.S. 412; 59 L. ed. 644.....	92
Mo. Pac. Ry. Co. v. Omaha, 235 U.S. 121; 59 L. ed. 147 .....	38, 39, 42, 61
Nashville, C. and St. L. Ry. Co. v. Walters, 294 U.S. 405; 79 L. ed. 949.....	20, 21, 22, 23, 33
.....	38, 42, 44, 45, 55, 57, 58, 59, 62, 65, 71, 82, 83, 85, 86, 88, 93
Niemotko v. Maryland, 340 U.S. 268; 95 L.ed. 267.....	87
Ohio Valley Co. v. Ben Avon Borough, 253 U.S. 287, 64 L. ed. 908.....	87
Oro Electric Corp. v. R. R. Comm., 160 Cal. 466; 147 Pac. 118	90
Oyama v. California, 332 U.S. 633; 92 L. ed. 249.....	87
Penn. Railroad Co. v. Driscoll, 198 Atl. 130; 9 A.(2d) 621.....	52
St. Louis & San Francisco Ry. Co. v. Public Service Comm., 254 U.S. 535; 65 L. ed. 389.....	46, 47, 48, 49
Schwabacher v. U. S., 334 U.S. 182; 92 L. ed. 1305.....	51
Southern Calif. Edison Co. v. Railroad Comm., 6 C.2d 737; 59 P.(2d) 808.....	88
So. Calif. etc. Lines v. Public Utilities Comm., 35 C.2d 586; 220 P.(2d) 393.....	90



	Pages
Southern Pacific Co. v. Arizona, 325 U.S. 761; 89 L. ed. 1915	
.....	47, 48, 49, 52
Southern Pac. Co. v. Railroad Comm., 13 C.2d 125; 81 P.(2d) 1052	
.....	72, 88, 89, 90, 91, 92, 93, 95
Southern Pac. Co. v. R. R. Comm., 13 C.2d 89; 87 P.2d 1055	
.....	90, 91
Southern R. Co. v. Virginia, 290 U.S. 190; 78 L. ed. 260	
.....	83
Town of Polk v. Railroad Comm., 154 Wis. 523; 143 N.W. 191	
.....	19
United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499; 79 L. ed. 1023	
.....	92
Washington Boulevard Case (Decision No. 47344 of June 24, 1952)	
.....	17, 18, 19, 38, 61, 65, 77
Wichita R. & L. Co. v. Public Utilities Comm., 260 U.S. 48; 67 L. ed. 124	
.....	92

### CONSTITUTIONAL PROVISIONS

#### Constitution of the State of California

Article I, Sections 13 and 14	83, 95
Article XII, Sections 22-24	70

#### Constitution of the United States

Commerce Clause (Art. I, Sect. 8, par. 3)	45, 47, 52, 83
Fourteenth Amendment	70, 83, 95

### STATUTES

Budget Act of 1950, Statutes of California, Chapter 2, p. 310	73
Budget Act of 1951, Statutes of California, Chapter 1020, p. 2706	73
Federal-Aid Highway Act of 1944 (58 Stat. L. 838)	35, 36
National Transportation Policy (Interstate Commerce Act as amended 1940), 54 Stat. 899; U.S.C.A. Title 49, before Part I, Chap. 1)	45, 49, 50, 51, 83

# TABLE OF AUTHORITIES

vii

	Pages
<b>Public Utilities Code of California</b>	
Section 1063 .....	90
Section 1202 .....	38, 70, 73
Section 1202 (c) .....	73, 74
Section 1214 .....	70
Section 1705 .....	89
Section 1757 .....	89
Section 1760 .....	86, 87, 88, 89, 90

## OTHER AUTHORITIES

Annual Report of the Public Utilities Commission for July 1, 1949 to June 30, 1950.....	73
California Jurisprudence, Vol. 5, Sec. 106, p. 695.....	71
California Jurisprudence, Vol. 27, p. 575.....	88
California Jurisprudence 2d, Vol. 2, p. 382 (Note 14).....	88
General Administrative Memorandum No. 325.....	36, 37
Statistical Abstract of the United States (1951—Seventy-Second Edition). Published by U. S. Dept. of Commerce.....	67
Statistics of Railways in the United States. Published by the Interstate Commerce Commission.....	67
Study by Stanford Research Institute, dated May 1, 1952, entitled "The Railway-Highway Grade Crossing Problem".....	34, 35, 65, 66, 67, 74, 75, 76, 77, 78, 79, 80, 81, 82,
The Economic Almanac of 1951-2. Published by the National Industrial Conference Board, Inc.....	67





S. F. No.

# In the Supreme Court of the State of California

**SOUTHERN PACIFIC COMPANY,  
a corporation,**

*Petitioner,*

**vs.**

**PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA AND R. E. MITTEL-  
STADT, JUSTUS F. CRAEMER, HAROLD P.  
HULS, KENNETH POTTER and PETER E.  
MITCHELL, as members of and consti-  
tuting said Commission,**

*Respondents.*

## Petition for Writ of Review

*To the Honorable Phil S. Gibson, Chief Justice, and to the  
Honorable Associate Justices of the Supreme Court of  
California:*

Petitioner, Southern Pacific Company, hereby respect-  
fully petitions the Court to issue a writ of review for the  
purpose of having the Court determine the lawfulness of  
Decision No. 47420 and Decision No. 47597 of the Public  
Utilities Commission of the State of California. Petitioner  
prays for the issuance of such writ upon the grounds here-



inafter set forth, severally and collectively, each ground being without limitation of any other. The attached Memorandum of Points and Authorities and Appendix are for all purposes incorporated herein by reference.

### **STATUS OF THE PARTIES**

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and has its principal place of business at 65 Market Street, San Francisco 5, California. Petitioner is a common carrier by railroad as defined in Section 211 of the Public Utilities Code of California, and as such is subject to all applicable provisions of the Public Utilities Act (Sections 201-2113 of the Public Utilities Code). Petitioner is a common carrier by railroad, engaged in the transportation of passengers and property in interstate commerce, as defined in Section 1 of the Interstate Commerce Act (Title 49, U. S. Code, Sec. 1), and as such is subject to all applicable provisions of the Interstate Commerce Act.

Respondent Public Utilities Commission of the State of California, for convenience referred to herein and in the appended Memorandum of Points and Authorities as "the Commission," exists by virtue of the Constitution and laws of California, particularly Section 22 of Article XII of the Constitution, as amended, and the portion of the Public Utilities Code known as the Public Utilities Act. The individual respondents are the duly appointed, qualified, and acting members of the Commission.

## II

**THE PROCEEDINGS IN WHICH DECISIONS NOS. 47420  
AND 47597 WERE RENDERED BY THE COMMISSION**

On May 7, 1951, the City of Glendale, a municipal corporation, made formal application to the Commission for the entry of an order, pursuant to the provisions of Section 43(b) of the Public Utilities Act (now Section 1202(c) of the Public Utilities Code) authorizing and requiring the separation of the railroad and highway grades at the existing grade-crossing of petitioner's main line, at Los Feliz Road (also known as Los Feliz Boulevard, and for convenience hereafter referred to as "Los Feliz") within said City; and apportioning as between said City of Glendale, the City of Los Angeles, and petitioner, the costs of construction of said separation. Said application was designated by the Commission as Application No. 32385; and a copy thereof is reproduced in the Appendix hereto, as Exhibit A.

Subsequently, on September 25, 1951, the Commission, on its own motion, issued an order instituting an investigation (identified as its case No. 5327) for the purpose of determining:

(1) Whether in the interests of public safety, convenience, and necessity, the aforesaid Los Feliz grade-crossing should be replaced by a grade separation, and

(2) The division and allocation of the costs of construction, as between your petitioner, the Cities of Los Angeles and Glendale, the County of Los Angeles, and the Department of Public Works, Division of Highways, State of California. Said investigation was subsequently consolidated with Application No. 32385 for purposes of hearing



and decision, and thereafter was handled jointly with said application, as a single proceeding. A copy of the order of September 25, 1951, instituting said investigation, is set forth in the Appendix hereto as Exhibit B.

Due hearing of the consolidated proceeding was held at Los Angeles on October 3, November 1, and November 29, 1951, and oral and documentary evidence<sup>1</sup> was received. Following the hearings, briefs were filed with the Commission on behalf of certain of the parties in interest, and the proceeding was duly submitted for a decision.

Under date of June 30, 1952, the Commission rendered its decision No. 47420 in said consolidated proceeding, a copy of which decision is set forth as Exhibit C in the Appendix. In the order annexed to said decision, as a part thereof, the Commission in effect directed the separation of the Los Feliz crossing by the construction of an underpass for the street, subject to certain conditions, which conditions, as far as material to this proceeding, are as follows:

1. The estimated cost of the structure, \$1,493,200, is to be paid 50% by petitioner, Southern Pacific Company, 25% by the County of Los Angeles, 12½% by the City of Glendale, and 12½% by the City of Los Angeles.

2. Upon completion of the construction of the separation, the cost of maintaining the superstructure thereof shall be borne by petitioner; the remainder of the cost of maintenance of the structure to be borne by the City of Glendale.

3. The City of Glendale is to prepare detailed plans for the construction of the grade separation, submitting the

---

1. A summary of the portions of such evidence bearing upon the issues presented by this petition is included as Exhibit J, pp. 104 to 120, of the Appendix to the Memorandum of Points and Authorities filed herewith.

same to the other interested parties, and to the Commission for approval.

4. The City of Glendale is to undertake the construction and, upon receiving the Commission's approval of the plans, to begin such construction and be responsible for its completion.

5. As various stages of the project are completed and payments therefor become due, such payments on account shall be contributed by the interested parties, in the proportions above specified.

6. The construction is to be commenced within one year and completed within two years, unless further time is needed and requested.

On July 9, 1952, and within the period specified by Section 1731 of the Public Utilities Code, petitioner served and filed its application for re-hearing in respect to the matters determined by Decision No. 47420. A copy of said application is reproduced as Exhibit D in the Appendix hereto.

On August 19, 1952, the Commission rendered its Decision 47597, consisting of its order denying petitioner's application for rehearing, and modifying slightly the language of the opinion forming a part of its Decision No. 47420. A copy of said Decision No. 47597 is set forth in the Appendix hereto as Exhibit E. The precise modification made by the Commission in Decision No. 47597 did not include any alteration of its prior conclusions, but consisted simply in substituting the words "apud track" for "yard track" in line 11 on page 2 of the original mimeographed decision, and the figure \$746,600 for \$746,000, in line 26, page 15, thereof.

### JURISDICTION OF THE COURT

The jurisdiction of this Court is invoked under Sections 1756 to 1760, inclusive, of the Public Utilities Code, as interpreted and applied by this Court in *Southern California Edison Company v. Railroad Commission*, 8 Cal.2d 737, 59 Pac.(2) 808, and *American Toll Bridge Co. v. Railroad Commission*, 13 Cal.2d 184, 191-4, 83 Pac.(2) 1, under which no court of this state, other than the Supreme Court, is authorized and empowered to review a decision of the Commission, for the purposes of having the lawfulness of the original order or decision or of the order or decision on re-hearing inquired into and determined. This Court is by said statute vested with power to determine whether the Commission has regularly pursued its authority, including a determination whether the order or decision under review violates any right of petitioner under the Constitution of the United States or of the State of California. Section 1758 of the Public Utilities Code provides that upon hearing, "the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the Commission."

Section 1760 of the Public Utilities Code provides:

"Sec. 1760. *When Supreme Court to exercise independent judgment on law and facts.* In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."



Petitioner has no remedy in any court of this State save by action of this Court in response to this petition; and unless the writ of review prayed for is granted, and determination made accordingly by this Court of the questions of law presented by the record, petitioner will be denied in any court of this State that judicial review to which it is entitled under the due-process clauses of the Fourteenth Amendment to the Federal Constitution and Section 13 of Article I of the Constitution of California.

#### IV.

##### **SPECIFICATIONS OF ERRORS**

Petitioner respectfully shows and alleges that the respondents, in rendering said Decisions Nos. 47420 and 47421, have not regularly pursued their lawful authority, have acted in excess of their jurisdiction, have wrongfully deprived petitioner of rights and property without due process of law, have denied to petitioner the equal protection of the laws, in violation of the Constitutions of the United States and of this State, and have taken action which results in undue and therefore unconstitutional burdens upon interstate commerce. More specifically, said respondents have erred in each and all of the following particulars:

1. The orders of the Commission under challenge herein undertake to allocate to and impose upon petitioner a proportion of the costs of the construction in question greatly in excess of any amount which would be warranted by the benefits accruing to the petitioner from such construction,

and which proportion is in fact wholly unrelated to such benefits; and said orders therefore operate:

(a) to deprive petitioner of its property without due process or just compensation, and,

(b) to subject petitioner and its facilities to undue, unreasonable, and excessive burdens.

2. Because of allocating such excessive and unrelated costs to be paid by petitioner, the Commission's order if enforced would require petitioner to subsidize its competitors, and to injure its own business correspondingly.

3. The orders of the Commission, if considered as a purported exercise of the police power, are unjustified and unreasonable, in that:

(a) no material considerations of safety of persons or property are involved, or shown to exist, in the situation to which said orders are directed;

(b) petitioner has not, by any act, action or omission of its own created or increased any hazard, inconvenience, obstruction, or interference affecting the general public, or those portions thereof who use the Los Felix crossing; any such conditions, to the extent that they may exist, having arisen out of circumstances wholly beyond petitioner's control or responsibility.

4. The allocation to petitioner of 50% of the cost of said construction is purely arbitrary, having no evidentiary basis whatsoever, and is wholly unrelated to any consideration of benefit to petitioner.

5. The Commission in its orders and decisions herein has failed to find ultimate facts on material issues, has made findings not supported by any substantial evidence, and further has made findings contrary to the evidence, and thus has denied to petitioner its constitutional rights to due process.

6. The Commission's order burdens interstate commerce, in violation of the Commerce Clause (Art. I, Sect. 8, par. 3) of the Constitution of the United States, and the "National Transportation Policy" enacted by Congress (54 Stat. 899; U.S.C.A. Title 40, before Part I, Chap. 13). The underpass in question is but one project in several states through which petitioner operates, which states are looking forward to many such projects in the future.

7. The Commission's orders, in apportioning to petitioner 50% of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence.

WHEREFORE, Petitioner prays that this Court issue a writ of review requiring respondents to certify to the Court its complete record in Application No. 32385 and Case No. 5327, including all pleadings, orders, memoranda, reporters' transcripts and exhibits forming a part of that record; that this Court review the record of said proceedings, and thereupon annul and set aside Decisions Nos. 47420 and 47597; that in the meantime the respondents, and each of them, be required to desist from further proceedings in said matters to be reviewed, and that the order requiring petitioner to pay a portion of the costs of the proposed



project be stayed; and that this Court afford petitioner such further relief as may be meet and proper.

**Respectfully submitted,**

**E. J. Foulke,**

**BURTON MASON,**

**RANDOLPH KARR,**

**Attorneys for Petitioner.**

**San Francisco, California**

**September 12, 1952**

State of California  
City and County of San Francisco—ss.

R. G. HILLEBRAND, being first duly sworn, deposes and says:

That he is an officer, to wit, Assistant Secretary of Southern Pacific Company, a corporation, the petitioner named in the foregoing petition, and makes this verification for and on its behalf; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters that he believes it to be true.

R. G. HILLEBRAND

Subscribed and sworn to before me  
this 12th day of September, 1952

NORMAN T. STONE

NOTARY PUBLIC in and for the City  
and County of San Francisco, State  
of California

(Memorandum of Points and Authorities and Appendix follow)

# **INDEX TO MEMORANDUM OF POINTS AND AUTHORITIES**

<b>Foreword</b> .....	<b>13</b>
<b>I. The orders of the Commission under challenge herein undertake to allocate to and impose upon petitioner a proportion of the costs of the construction in question greatly in excess of any amounts which would be warranted by the benefits accruing to the petitioner from such construction, and which proportion is in fact wholly unrelated to such benefits; and said orders therefore operate:</b>	
(a) To deprive petitioner of its property without due process or just compensation; and	
(b) To subject petitioner and its facilities to undue, unreasonable, and excessive burdens.....	<b>16</b>
<b>The trend of the Commission's Rulings: the "Barrier Concept," as Opposed to the "Benefit Principle"</b> .....	<b>25</b>
<b>Bases of Apportionment Followed Nationally and in Other States</b> .....	<b>33</b>
<p><b>Note:</b> The discussion in this subdivision covers also specification of error #6 set forth in the petition as follows: "§ 6. The Commission's order burdens interstate commerce, in violation of the Commerce Clause (Art. 1, Sec. 3, par. 3) of the Constitution of the United States, and the 'National Transportation Policy' enacted by Congress (54 Stat. 509; U.S.C.A. Title 49, before Part 1, Chap. 1). The underpass in question is but one project in several states through which petitioner operates, which states are looking forward to many such projects in the future."</p>	
<b>II. Because of Allocating Such Excessive and Unrelated Costs to be Paid by Petitioner, the Commission's Order if Enforced Would Require Petitioner to Subsidize Its Competitors, and to Injure Its Own Business Correspondingly</b> .....	<b>52</b>



**III. The Orders of the Commission, If Considered as a Purported Exercise of the Police Power, Are Unjustified and Unreasonable, in that:**

(a) No Material Considerations of Safety of Persons or Property Are Involved, or Shown to Exist, in the Situation to Which Said Orders Are Directed;

(b) Petitioner Has Not, by Any Act, Action or Omission of Its Own Created or Increased Any Hazard, Inconvenience, Obstruction, or Interference Affecting the General Public, or Those Portions Thereof Who Use the Los Feliz Crossing; Any Such Condition, to the Extent That They May Exist, Having Arisen Out of Circumstances Wholly Beyond Petitioner's Control or Responsibility.....

60

Note: The discussion in this subdivision covers also Specification of Error No. 7 set forth in the petition as follows:  
 "7. The Commission's orders, in apportioning to petitioner 50% of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence."

**IV. The Allocation to Petitioner of 50% of The Cost of Said Construction is Purely Arbitrary, Having No Evidentiary Basis Whatsoever, and Is Wholly Unrelated to Any Consideration or Benefit to Petitioner.....**

70

**V. The Commission in its Orders and Decisions Herein Has Failed to Find Ultimate Facts on Material Issues, Has Made Findings Not Supported by Any Substantial Evidence, and Further Has Made Findings Contrary to the Evidence, and Thus Has Denied to Petitioner Its Constitutional Rights to Due Process.....**

83

(a) The Finding With Respect to Public Safety Is Unsupported by the Evidence, and Such a Finding Is Therefore a Denial of Procedural Due Process.....

83

(b) The Absence of Findings on Material Issues Requires the Decisions Be Set Aside.....

88

**Conclusion .....**

94

S. F. No.

# In the Supreme Court of the State of California

**SOUTHERN PACIFIC COMPANY,**  
a corporation,

*Petitioner,*

vs.

**PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA and R. E. MITTEL-  
STAEDT, JUSTUS F. CRAEMER, HAROLD P.  
HULS, KENNETH POTTER and PETER E.  
MITCHELL, as members of and consti-  
tuting said Commission,**

*Respondents.*

## **Memorandum of Points and Authorities in Support of Petition for Writ of Review**

### **FOREWORD**

As appears in more detail in the foregoing petition and by reference to the text of the orders themselves, the order of the Commission here particularly challenged (No. 47420) embodies the Commission's approval of a proposal made by the City of Glendale for the construction of a grade separation, in place of the present grade-crossing, at the intersection of petitioner's main line with Los Feliz, adjacent to the west boundary of said City.

The Commission's said order further deals with certain matters arising in connection with that proposal, namely:

- (a) it prescribes that the separation shall be a roadway underpass;
- (b) it reviews and settles the question of the nature of the drainage facilities required;
- (c) the dates for the commencement and completion of the project are specified;
- (d) provision is made for subsequent maintenance of the structure; and,
- (e) most important of all, so far as the instant case is concerned, an allocation is made, as between the several parties in interest, of their respective proportions of the cost of the new structure.

It is important at the outset to note that petitioner did not, at any stage of the proceedings, and does not now oppose the construction of a grade separation at Los Feliz. On the contrary, petitioner has favored and supported that proposal. Its representatives have cooperated fully with representatives of other parties in interest, including the members of the Commission's own staff, in conducting studies and preparing plans in connection therewith, and in presenting the same to the Commission at the formal hearing (for example, see Exhibit 2 of the record before the Commission). Petitioner has recognized that this separation will be of substantial benefit to the public, in not only the Cities of Glendale and Los Angeles, but also Los Angeles County and the State of California at large, in promoting the freedom of movement of persons and property by motor vehicle upon a public highway which is geographically important as both a main artery between



the two cities and also as a major connection with the state and Federal highway systems. While there is no pretense that any substantial safety consideration could be urged to support the proposal (the Los Felix crossing having been the scene of only 14 accidents, involving only 9 personal injuries and 1 fatality, over the period of more than 25 years last past: see Exhibit 2, p. 30 reproduced as p. 89, Ex. F of the Appendix), on the other hand it is clear that delay and inconvenience to a substantial volume of motorized traffic would be eliminated, with resulting actual material benefits to the traveling and shipping public, and correspondingly to the interested political subdivisions above referred to.

Petitioner recognizes further that it will itself receive incidental, but nevertheless measurable benefits from the separation, and is prepared and willing to contribute as its share of the overall cost a sum equal to the computed value of such benefit. As the record fully shows, and the facts set forth by Decision No. 47420 indicate, in the instant case that value is \$118,340, said sum being based on the net saving in annual expense (\$5917) now incurred, but which would be eliminated, capitalized at 5% per annum. The amount allocated to petitioner by the Commission is, however, \$746,600, representing 50% of the estimated overall cost of the project, as set forth in the Commission's findings.

Thus this petition is directed principally to the Commission's action in allocating to petitioner, as its contribution, an amount substantially exceeding and indeed having no relation to the actual benefits accruing to the petitioner, and to the Commission's failure and refusal to limit such allocation to the amount shown to represent the fair value of such benefits.

It may be noted that petitioner does not here concern itself directly with the Commission's apportionment, as between the other parties to the proceeding; of that portion of the overall cost not allocated to petitioner. However, petitioner does direct attention to the fact that the Commission, in making its apportionment between these other parties, has apparently followed the benefit principle to some extent, though refusing to do so in making the apportionment as between the petitioner and the other parties: a feature of the decision which clearly indicates the purely arbitrary nature of the allocation.

# I

**THE ORDERS OF THE COMMISSION UNDER CHALLENGE HEREIN UNDERTAKE TO ALLOCATE TO AND IMPOSE UPON PETITIONER A PROPORTION OF THE COSTS OF THE CONSTRUCTION IN QUESTION GREATLY IN EXCESS OF ANY AMOUNTS WHICH WOULD BE WARRANTED BY THE BENEFITS ACCRUING TO THE PETITIONER FROM SUCH CONSTRUCTION, AND WHICH PROPORTION IS IN FACT WHOLLY UNRELATED TO SUCH BENEFITS; AND SAID ORDERS THEREFORE OPERATE:**

- (a) To Deprive Petitioner of Its Property Without Due Process or Just Compensation, and
- (b) To Subject Petitioner and Its Facilities to Undue, Unreasonable, and Excessive Burdens.

Note: The discussion in this subdivision covers also specification of error #6 set forth in the petition as follows: "6. The Commission's order burdens interstate commerce, in violation of the Commerce Clause (Art. I, Sect. 8, par. 3) of the Constitution of the United States, and the 'National Transportation Policy' enacted by Congress (54 Stat. 899; U.S.C.A. Title 49, before Part I, Chap. 1). The underpass in question is but one project in several states through which petitioner operates, which states are looking forward to many such projects in the future."

As already stated, the primary issue in this case arises because the Commission has refused to follow the fundamental principle of apportioning contributions on the basis of benefits and need, has employed a purely arbitrary allocation. The Commission's own explanation of its actions, so far as it concerns the proportion to be paid by petitioner, is contained in the following excerpt from its Opinion in Decision No. 47420 (Appendix, p. 32):

"While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad."

In its Decision No. 47344\* dated June 24, 1952, in Application No. 29396 (also known as the *Washington Boulevard Case*) to which reference is made in the excerpt just quoted, the Commission had said:

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise

(\*) A petition for a writ of review directed to this decision was filed in this Court on July 24, 1952, and is now pending as S.F. 18671, "A. T. & S. F. Railway Co. vs. Public Utilities Commission."



of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Eric Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U.S. 394; 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U.S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U.S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U.S. 24; 73 L. ed. 161)."

Notwithstanding the Commission's repeated assertion that it is not bound to follow the so-called "benefit theory" in grade-separation cases, the fact is that the benefit principle received the approval of this Court, in a case arising shortly after the 1915 amendments to the Public Utilities Act were adopted:

*City of San Jose v. Railroad Commission*, (1917) 175 Cal. 284, 165 Pac. 967.

In that case the City of San Jose challenged an order of the Commission allocating to said city 35% of the cost of a grade separation of one of its major streets, and contended that in so doing, or indeed in allocating to it (the city) any portion of the cost, the Commission had exceeded its lawful authority. It may be noted that the order had allocated 50% of the cost to the railroad company, and 15% to the State Highway Commission.

This Court sustained the Commission's order, saying in part (at page 289):

"The right of apportionment of the cost by the Commission to the parties benefited by the crossing is a proper element of this cognate power (of the Commission). That a city receives benefit from a safety device such as that here contemplated may not be doubted." (Emphasis added).

These expressions were cited with apparent approval and in part quoted by this Court in:

*S. H. Chase Lumber Co. v. Railroad Commission*  
(1931) 212 Cal. 691, (701), 300 Pac. 12.

Note should also be taken of this Court's citation, in the *San Jose* opinion, and reliance on three other opinions approving apportionment of grade-separation costs on the benefit basis:

*Town of Polk v. Railroad Commission*, 154 Wis. 523,  
143 N.W. 191;

*City of Milwaukee v. Railroad Commission*, 162 Wis.  
127, 155 N.W. 948;

*In Re Erie Railroad Company*, 208 N.Y. 486, 102  
N.E. 562.

In the *Milwaukee Case*, the Supreme Court of Wisconsin had said, in language also quoted by this Court:

"The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen the great danger of the grade crossing. Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about?"

It will be noted that in the Commission's opinion in the *Washington Boulevard Case*, four decisions of the United

States Supreme Court are cited, apparently with the thought that they support the Commission's statement of its understanding of the controlling principles of law. These four cases are discussed in more detail hereafter in this memorandum. Attention is called to them at this point solely in order to emphasize that they do not constitute the latest pronouncements of the Court on this issue and, that to the extent that they follow a principle in conflict with that Court's more recent expressions, they must be considered to have been overruled or, in any event, greatly limited in their application. The latest decision of the Court bearing directly upon this question is:

*Nashville, C. and St. L. Ry. Co. v. Walters*, (1935),  
294 U.S. 405, 79 L. ed. 949.

In that case the Court reversed a judgment of the Supreme Court of Tennessee, which had held that the railroad company was properly chargeable with 50% of the cost of an underpass on a main state highway. The primary ground of the decision was that the action of the state violated the due-process clause of the Fourteenth Amendment. The Court said, in part (at p. 416):

"The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use of highways; the change in the occasion for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the



relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents."

Further, the Court said (at pp. 421-424):

"The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. In this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and draining it, to shortening distance, to setting up guard rails, and to bridging streams. The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal-aid system, Tennessee highways were built under the direction of the county courts, and paid for out of funds raised locally by taxation or otherwise. They served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was rarely a hardship. For the need for eliminating existing crossings, and the need of new highways free from grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the

growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade is now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous."

Again the Court said (pp. 428-430):

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403; *Missouri Pacific Ry. v. Nebraska*, 217 U.S. 106; *Great Northern Ry. v. Minnesota*, 238 U.S. 340; *Great Northern Ry. v. Cahill*, 253 U.S. 71. These were the authorities relied upon by this Court in *Chicago, St. P. & O. Ry. v. Holsberg*, 282 U.S. 162, 167, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co. v.*

*Illinois ex rel. Drainage Commissioners*, 200 U.S. 561, 592. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Compare *Hadacheck v. Los Angeles*, 239 U.S. 394; *Müller v. Schoene*, 276 U.S. 272. While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry. v. Nattin*, 277 U.S. 157, 159; *Memphis & Charleston Ry. v. Pace*, 282 U.S. 241, 246; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them."

The Court's opinion leaves no doubt that a mere arbitrary allocation of cost, without consideration of the benefits received, constitutes a denial of due process and a consequent violation of constitutional rights. It is appropriate therefore to call attention to the striking similarity between the facts especially referred to by the Court in the cited case, and those facts of the present case which the Commission has apparently refused to consider as having particular significance.

In the first place, as in the cited case, the proposed separation will not reduce or eliminate any substantial hazard to the traveling or motoring public at the existing grade



crossing, for with the present protection there is in fact no material actual hazard (see Ex. 2, pp. 28, 30, Appendix, pp. 87, 89). In short, no real question of public safety is here presented. In the second place, again as in the cited case, the sole motivating consideration for the present proposal is the freedom of movement of highway traffic; i.e., the elimination of delays to motor vehicles at both the crossing itself and also the nearby intersection of Los Feliz with U.S. 99 (San Fernando Road). In the third place, and again as in the cited case, the roadway involved is not merely a local road, or an actual or potential "feeder of rail traffic", but is both a main artery between the two cities immediately involved, and an important link in through routes from and to points and areas far outside of and beyond those cities, and in fact is used by a substantial volume of motor-borne traffic from and to points and districts served by petitioner, which conceivably might to some extent move as rail-borne traffic over petitioner's lines. Thus here, as in the cited case, the existing roadway presently serves to deplete petitioner's traffic and revenue; and the separation, by improving the roadway further and adding to its convenience and attractiveness, will serve to intensify the motor competition and to injure petitioner still more.

As the Supreme Court pointed out—and the same observation is emphatically pertinent to the case at bar—the avoidance of interruption and delay is of far greater importance to the highway users than to the railroad. Indeed, in the present case such avoidance does not concern the railroad at all, for there is no showing, nor even any claim, that its trains have been delayed at the present crossing.

In this respect, the highway traffic will be the sole beneficiary of the separation.

**The Tread of the Commission's Railings: the "Barrier Concept,"  
as Opposed to the "Benefit Principle"**

While the Commission's order, challenged but sustained in the *San Jose case*, supra, imported at least a partial acceptance of the benefit principle of allocating grade-separation costs, later decisions of the Commission, rendered prior to 1933, showed some disposition on its part to be influenced by the so-called "barrier" concept. Thus, in Decision No. 24782, *Application of the City of San Bernardino* (May 23, 1932) 37 C.R.C. 506, the question was raised as to the participation of a railway company (the Santa Fe) in the cost of widening and extending a railroad overpass within the city. The opinion states that the street involved was of some importance, as a connection between major highways serving other cities and areas, as well as affording direct communication between districts within the city. The railroad contended that it would not receive any benefit from the proposed reconstruction, and therefore should not contribute. The Commission, in its opinion, said in part (at pp. 508-509):

"The representative of The Atchison, Topeka and Santa Fe Railway Company testified that the expense of widening and reconstructing the viaduct was not economically justified at this time and that the railroad company should not be assessed with any part of the cost inasmuch as the railroad company would not be benefited by such widening and reconstruction. We can not subscribe to this opinion since it has been clearly shown that certain hazards now exist on this

viaduct which should be eliminated and that while certain reconstruction work is necessary in connection with the removal of these hazards, it is only reasonable to redesign the structure so as to adequately accommodate present and reasonably anticipated future traffic. *The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and the public should contribute toward the cost of such improvement.* In apportioning the cost of reconstructing this viaduct between the applicant and the railroad company, due consideration should be given to the obligation of each party, as well as to the benefits to be derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.

In this particular case there are two very important conditions which must be given full consideration: One, the elimination of existing hazards on this viaduct, and the other, the adequacy of the structure to carry traffic. *There is no question but that the railroad has a direct obligation to assist in the elimination of hazards. The widening of the structure becomes necessary to meet the increased traffic conditions on the highway and not as a result of a changed character or volume of the railroad situation; consequently the benefits from such widening accrue largely to the vehicular public.* (Emphasis added).

The Commission accordingly ordered that the railroad should pay \$75,000, as its contribution to a total estimated cost of \$266,000.



In a companion decision rendered about two months later: Decision No. 25069, *Application of the City of Los Angeles* (August 15, 1932), 37 C.R.C. 784, question was again raised as to the railroad company's contribution toward the widening and improvement of an existing grade separation. Again the point of lack of benefit to the railroad company was argued. The Commission's comment, couched in language approximating what it had said in the earlier *San Bernardino case*, was as follows (at pp. 786-787):

"The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.

*There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost.*" (Emphasis added).

Accordingly, the railroad was required to bear 25% of the cost of the project, subject to the condition that if the roadway were widened, and excess costs were thereby incurred, the railroad should not be required to bear any portion of such excess.

It will be observed that in these two decisions the Commission did not by any means reject completely the benefit principle. In both cases it was recognized that the benefits accrued largely to the "vehicular public" and, as stated in the *Los Angeles* decision (No. 2506), it followed that this class of the public should bear the greater portion of the cost.

Nevertheless, the so-called "barrier concept" was given weight as justifying the assessment of a portion of the cost against the railroad company, irrespective of benefit. This concept may be stated somewhat as follows:

The railroad, by its very presence across the roadway, presents a barrier to economic and social development of the area of a crossing, a barrier to maximum development of land areas beyond the crossing, and a barrier to the free flow of traffic across its own right of way. Since on this basis it is held that the railroad has been the aggressor in preventing the free and unhampered use of the public thoroughfare, it is, by the same token, responsible for a substantial share of the cost of improving, and eventually eliminating, such crossings.

From the practical standpoint there are two obvious defects inherent in the "barrier" concept. In the first place, the fundamental premises are not substantially correct. A railroad is an important aid, rather than a barrier, to economic and social development in the area which it serves. To insist that the railroad is a barrier is to argue that it should be entirely relocated, not merely that crossings should be eliminated, or that a railroad should contribute greater amounts or proportions toward the construction of improvements. In the second place, the barrier concept

standing by itself presents no basis whatever upon which to distribute costs as between the railroad and the public. When the barrier concept is controlling, the result is to substitute the individual and variable views and opinions of the successive members of the Commission who may become charged with the responsibility for its decisions, in place of the definite and reasonably precise economic considerations which ought to govern in determining cost allocations.

It is important therefore to note that in the period commencing in and following 1933, the Commission gave but little weight to the barrier concept and instead, in practically all cases in which the issue was raised, allocated costs of grade separations primarily upon the basis of *actual benefit*, particularly insofar as concerned contributions of the interested railroads. The leading decision stating this policy was No. 25551, rendered in the so-called *Goshen case*: *Application of the Department of Public Works* (January 16, 1933), 38 C.R.C. 380, in which the Commission said (at p. 386):

"In allocating the costs here we are departing from the practice which has obtained generally heretofore of assessing one-half to each the public and the railroad in case of an existing grade crossing. While this procedure has appeared equitable in the past, the tremendous changes in transportation conditions make necessary a reappraisal of the liabilities of the two parties at interest. The railroad still continues to be the aggressor in preventing the free and unhampered use of the public thoroughfare, but the needs of the traffic on the highway have not only increased and changed in nature, but the use of the highway has become in large measure directly competitive with the



rail line. These and incidental conditions following them have changed the benefits flowing from the separation of grades between these two great avenues of traffic.

"After carefully considering all the evidence in these proceedings, it is concluded that the order should authorize the grade separation, as proposed, and fix the amount to be contributed by the railroad in a lump sum based upon direct and indirect benefits. This sum is arrived at by capitalizing an amount measuring the annual benefits and privileges on a 6 per cent basis. If applicant elects to proceed with the construction of the separation, where according to the record there is some question as to its present economic justification, it shall bear the remainder of the cost and choose the width of subway it desires to construct."

Subsequently, in the same year the Commission in several decisions adhered to the benefit principle:

Decision No. 25588, *Application of Department of Public Works (Madrone Underpass)* (January 30, 1933), 38 C.R.C. 425;

Decision No. 25811, *Application of Department of Public Works (Alto Overpass, etc.)* (April 10, 1933), 38 C.R.C. 606;

Decision No. 25812, *Application of Department of Public Works (El Monte Underpass)* (April 10, 1933), 38 C.R.C. 612.

In Decision No. 25811, where it was shown that there was no substantial public necessity for the crossings other than the saving in time to motor traffic, and certain minor operating savings to the railroad, the Commission held that the

barrier except had no application, and that the railroad company should make no contribution at all on that basis, or to any extent beyond its own direct benefits. Specifically the Commission said (38 C.R.C., at pp. 611-612):

"In passing upon the above matters, consideration has been given to the fact that in each case the separation was a part of a highway change made primarily to benefit the users of the highway in the way of decreasing the length of travel and improving the grades and alignment of the highway. Economic studies introduced in these proceedings show that the vehicular traffic on the highway has materially benefited through these expenditures. On the other hand the railroad has been benefited to the extent shown above. It is recognized that the railroad must expect to permit highway development by admitting the construction of new highways over its tracks. In these cases the railroad has in each instance authorized and permitted applicant to proceed with the work but takes the position that it should not be required to participate in the expense of constructing the various separations beyond its direct benefits. *In none of the above matters has there been shown any public necessity for the improvement aside from the economic saving accruing to the traffic on the highway and operating savings to the railroad. Passage to the public across the railroad was adequately provided without these separations. For these reasons no costs have been imposed upon the railroad because it stood as a barrier to the new highway alignment.*" (Emphasis added.)

It is petitioner's position here that the Commission's own quoted statement is particularly applicable in this case, in that the only public necessity asserted or which could be shown is the elimination of delays to highway traffic, and it

particularly appears that safe passage of that traffic (subject of course to delays) is now provided, without the proposed separation. We emphasize that the petitioner is here seeking nothing more than the fair application of the principles stated by the Commission in the excerpt last quoted.

To show the continuing application of the benefit principle in this state, in the years subsequent to and including 1933, we attach as Exhibit G, pp. 92-97 of the Appendix a statement listing the grade separations in this state to which petitioner and its affiliated companies operating steam railroads (i.e., the Northwestern Pacific, and the San Diego and Arizona Eastern), have been parties. This statement shows each of the separations by location, year of construction, overall cost, and actual or percentage contribution of the railroad. It will be noted also that each separation was duly authorized by an order of the Commission, the number of which is shown; and that in each case the cost allocation was either prescribed, or (in case of prior agreement of the parties) approved, by the Commission. It may be noted that the overall cost of these separations was slightly more than \$22,000,000.

It is significant that in the vast majority of the separations listed the railroad contributed nothing at all; the parties having apparently agreed that it had no responsibility, would receive no benefit, and hence should not be required to participate. This was notably true in those cases where the public authorities were the moving parties, and were undertaking to construct a new or alternate roadway across an existing railroad. In two cases where the railroad was itself the moving party (Nichols and Russ-



Lang), the railroad agreed to assume the entire cost. In those few cases where the parties did not agree in advance, the apportionment is shown to have been on the benefit basis, with, generally, the railroad's apportionment limited to either a fixed maximum, or a small percentage.

#### Bases of Apportionment Followed Nationally and in Other States

The Commission's refusal in the present case (and in the recent and still pending case involving the Santa Fe, above referred to) to apply the benefit principle in determining the railroad's contributions, thus constitutes a reversal of the trend of thinking and practice in this State, prevailing since 1933, and sanctioned and approved by the United States Supreme Court in the *Walters decision*, *supra*. The Commission has undertaken to return to an earlier concept which (though at one time having some apparent logical basis) is no longer responsive to present-day realities.

To demonstrate how far the prevailing view has moved away from the "barrier" concept, we have prepared, and attach as Exhibit H of the Appendix an analysis of the legislative provisions and actual practices currently existing in the various states in relation to this subject matter. For convenience we here summarize the more significant features disclosed by the analysis:

- (1) There exist in a number of states legislative limits upon the amount that can be assessed against the railroad in highway-railroad grade-separation projects;
- (2) In many states that limit is established at considerably less than 50 percent, being not more than 10 percent in some;

- (3) In numerous states the allocation is made by regulatory authority or other state agency, based upon the individual project;
- (4) In only 14 states is the allocation based upon a fixed formula of 50 percent or more to the railroad;
- (5) Among those states fixing a maximum allocation to the railroads of 15 percent or less are the highly industrial and populous states of Michigan, New Jersey, New York, and Ohio;
- (6) In West Virginia and New Mexico, the latter a sparsely populated state, with relatively small industrial stature, and limited funds from highway user taxes, the maximum allocation of cost to the railroads on grade-separation projects is only 10 percent;
- (7) Wherever in any state any federal funds are used, even in part, the maximum allocation to the railroads is 10 percent, under federal law, and irrespective of state law or practice.

In an authoritative study prepared by the Stanford Research Institute, dated May 1, 1952, and entitled, "The Railway-Highway Grade Crossing Problem," the following observations are made with respect to the trends of state legislative enactments dealing with the disposition of costs for railroad-highway grade crossing improvement (at p. 47):

"Since the 1880's state legislatures and city councils in all parts of the nation have passed laws governing the distribution of costs for grade crossing improvements and eliminations. All except a few states now have statutes providing for either a fixed-percentage

distribution of cost between the railroads and the public, or the vesting of power to fix cost distribution in a state commission or department. There is no substantial similarity among state laws in the distribution of costs, nor in the bases of allocation used by state commissions or departments in distributing such costs. In several states distribution of costs is made on the basis of agreements reached between the railroad and the responsible public authority.

There have been two significant tendencies in development of state laws governing distribution of costs for grade crossing improvements. First, there has been a tendency over the years for the percentage of the total cost allocated to the railroads to decrease. Second, there has been an increasing tendency for state laws to specify the principle that costs for construction of grade crossing eliminations should be distributed among beneficiaries on the basis of the relative benefits derived from the elimination."

The benefit principle has received the specific approval of Congress in enacting legislation in furtherance of highway construction, as shown by Section 5 (b) of the Federal-Aid Highway Act of 1944 (58 Stat. L. 838, 841):

"(b) Any railway involved in any project for the elimination of hazards of railway-highway crossings paid for in whole or in part from funds made available under this Act, shall be liable to the United States for a sum bearing the same ratio to the net benefits received by such railway from such project that the Federal funds expended on such project bear to the total cost of such project. For the purposes of this subsection, the net benefits received by a railway from any such project shall be deemed to be the amount by which the reasonable value of the total benefits re-



ceived by it from such project exceeds the amount paid by it (including the reasonable value of any property rights contributed by it) toward the cost of such project; and in no case shall the total benefits to any railway or railways be deemed to have a reasonable value in excess of 10 per centum of the cost of any such project."

Following the policy set forth in the Federal-Aid Highway Acts, the United States Bureau of Public Roads issued in 1948 its General Administrative Memorandum No. 325, which sets forth principles governing the cost responsibility of railroads for grade-crossing improvements and eliminations financed in whole or in part by federal funds. This memorandum provides that:

1. When principal grade crossings are closed by the completion of a grade separation, the railroad shall be deemed benefited and shall contribute 10 percent of the total cost of the project.
2. The railroad shall not be deemed benefited nor required to contribute toward the replacements, widening, or strengthening of existing railway-highway grade separations.
3. When automatic signal devices are provided for grade crossings as a matter of increased protection, the railroads shall contribute 10 percent of the total cost of the project as representing the value of railroad benefits.
4. No benefits will be considered as accruing to the railroads, and no railroad contributions will be required, when protective devices or grade separa-

---

\*This section is still in effect, having been extended in 1948 (62 Stat. L. 1105), and again in 1950 and 1952 by the Federal Aid Highway Acts of those years. (Public Law 413, 82nd Congress, enacted June 25, 1952).

tions are provided as a result of a new street or highway (not a relocation) intersecting an existing railway track. When a new railway track intersects an existing street or highway, the cost of a grade separation or protective devices shall be considered as being entirely for the benefit of the railroad, and it shall stand the total cost of the project.

It may be noted, in passing, that in the principal decision here challenged, the Commission has undertaken to find, contrary to the evidence bearing directly on the issue, that the proposed construction does not concern a state highway, and accordingly the Department of Public Works of the State is not directly involved. (See p. 13 of the opinion: p. 32 of the Appendix. This finding is directly contrary to the undisputed testimony of the Principal Traffic Engineer of the City of Los Angeles, who pointed out that stoppage of traffic at the Los Felix grade crossing created a "back-lash" which affected the traffic and thus caused congestion on San Fernando Road (U.S. 99), as well as the testimony of the Assistant District Traffic Engineer of the State Division of Highways, who admitted that such effects occasionally took place, though in his opinion they were of minor consequence. It is suggested that the Commission made its finding, in the face of this positive testimony, in order to avoid any possibility that the State Department of Public Works might be called upon to contribute; since in that event, federal funds being potentially involved, the contribution to the railroad might have to be limited to 10 percent of the allocable cost.

As already pointed out, the Commission in its principal decision here under challenge has incorporated by reference

its holding in Decision No. 47344, the so-called *Washington Boulevard* case, to the effect that it is not bound to follow the benefit theory, but may allocate costs in the exercise of the police power delegated it by Section 1202 of the Public Utilities Code; and has quoted as the authorities supporting this conclusion four decisions of the United States Supreme Court. Those decisions are:

*Chi., Mtl. & St. P. Ry. Co. v. Minneapolis* (1914), 232 U. S. 490, 58 L. ed. 671;

*Mo. Pac. Ry. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. ed. 157;

*Erie R. Co. v. Public Utility Commissioners* (1920), 254 U. S. 394, 65 L. ed. 322;

*Lehigh Valley R. Co. v. Public Utility Commissioners* (1928), 278 U. S. 24, 73 L. ed. 161.

It will be observed that each of these cases was decided prior to the *Walters* case, *supra* (March 4, 1935); furthermore, that neither in Decision No. 47344, nor in No. 47420, here challenged, did the Commission cite or refer to the *Walters* case, or make any attempt to distinguish that case from either of the cases before the Commission.

The *Minneapolis* case, decided February 24, 1914, had to do with the allocation of the expense of building a bridge required to carry the railroad company's tracks over a canal or waterway being constructed by the City to connect certain lakes in a public park then being developed. Relying upon earlier cases, in which the dangers inherent in railroad grade crossings were principally referred to, the Court held that the railroad company might be required, at its own expense, to build and maintain a suitable overpass to carry its tracks over a public highway, even though that public



highway might be a waterway instead of a roadway. Unquestionably this case, if it had not been qualified by later decisions of the same Court, would be an authority supporting the Commission's position. However, in the light of later decisions, and more especially the vast change in conditions since 1914, obviously this decision can no longer be regarded as the sole controlling authority.

The *Omaha* case, decided November 30, 1914, presented the question of the power of the city to require the railroad company to build a highway overpass, sufficient to carry not only the ordinary traffic of the street, but also the tracks and vehicles of a street-railway company; the provision for the latter having increased the cost from \$30,000 to about \$80,000. Throughout the opinion of the Court, emphasis was laid upon the exercise of the police power by the city, in the interest of public safety; and indeed it may be said of the decision that it is predicated almost entirely upon safety considerations. Thus the Court said (235 U. S. at p. 129):

"The broad authority to require any railroad company to make such improvement, in the interest of public safety, is conferred by the legislature upon the city. The safety of the travelling public is the primary consideration. . . . The public when being transported by the street railway company was exposed to the dangers of a grade crossing, which it was within the authority of the State to authorize the municipality to discontinue." (Emphasis added.)

In the *Erie* case the question was as to the power of the New Jersey Board of Public Utility Commissioners to require the Erie Railroad to construct a number of grade separations in the City of Paterson. In this case again,

the Court's action in sustaining the imposition of cost upon the railroad was predicated almost entirely upon safety considerations. Thus, it was said (254 U.S., p. 410, 411):

"the State . . . has a constitutional right to insist that they (railroad-highway crossings) shall not be made *dangerous* to the public, whatever may be the cost to the parties introducing the *danger*. That is one of the most obvious cases of the police power, or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down *whenever and so far as the safety of the public requires* . . . If it *reasonably can be said that safety requires the change* it is for them (the states) to say whether they will insist upon it. . . . To engage in interstate commerce the railroad must get on to the land and to get on to it must comply with *the conditions imposed by the state for the safety of its citizens.*" (Emphasis added.)

The Court also said (at p. 412):

"... If we could see that the evidence plainly did not warrant a finding that the particular crossings were *dangerous* there might be room for the argument that the order was so unreasonable as to be void. *The number of accidents shown was small and if we went upon that alone we well might hesitate. But the situation is one that always is dangerous.* The board must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change. If they were reasonably warranted in their conclusion their judgment must stand." (Emphasis added.)

In the *Lehigh Valley* case the principal question was whether the railroad might be required to pay for the construction of an overpass, the particular question being whether an order requiring an expenditure of \$324,000 was reasonable, when it appeared that an adequate though less desirable crossing might have been constructed for about \$100,000 less.

Again the Court emphasized safety considerations as the primary basis for the exercise of the police power to require construction of grade separations. Thus the Court said (at p. 34):

"A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad."

After citing the *Erie* case, *supra*, the Court continued:

"If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits." (Emphasis added.)

There are two distinct, and equally adequate reasons why these cases cannot be considered as supporting the conclusions of the Commission in the decision here challenged,



and it follows that the Commission erred in relying upon them. The first reason is that the cases obviously do not embody the final expressions of the views of the Court in relation to the facts of today. All of these cases were before that Court when it rendered its decision in the *Walters case*. Each of them was cited to it by the appellees in their effort to sustain the ruling of the State Supreme Court (see 294 U. S., at pp. 410, 411, where the argument on behalf of the State of Tennessee is summarised); and each of them is referred to in the text of the Court's opinion (294 U. S., at p. 415, and also pp. 430, 431, where the citations of these and other cases are repeated).

The second reason is that in each of the four cases relied upon by the Commission, and particularly in the *Omaha*, *Eric* and *Lehigh Valley* cases, the primary emphasis of the Court was upon safety considerations: i.e., the elimination of hazard to the public. Safety considerations were stressed again and again, as the above excerpts show, as being the primary factor supporting the exercise of the State's police power. In the instant case, on the other hand, the alleged need for greater safety of the public at the crossing is not relied upon at all, by either the parties who have proposed the separation, or the Commission itself in its decision here challenged; and in fact, the record demonstrates conclusively that public safety at the crossing is already adequately provided. The entire emphasis throughout this proceeding, and notably in the Commission's decision, has been upon *convenience to automotive traffic* on Los Feliz, and generally upon the network of highways of which it forms a part. Compare the references in the decision to the fact that Los Feliz has reached its capacity and is now carrying an overload; to the traffic checks made at the crossing and

the delay to vehicles resulting from the passage of trains; to the stoppage of traffic at the crossing upon such occasions, and the resulting "back-lash" affecting traffic at the nearby crossing of San Fernando road; and finally the Commission's own conclusions (p. 14 of the decision; Appendix, p. 39) that the evidence shows that the great increase in vehicular service is one reason for constructing "a grade separation", the clear intendment of the comment being that such increase was the obvious and controlling reason for this proposal.

As contrasted with these repeated references to the *convenience* or, on the other hand, *delay* to automotive traffic, there is virtually no mention in the opinion of the Commission of any safety consideration. There is, of course, a formal finding (at p. 13; Appendix, p. 32) that the construction will be in the interest of public safety, convenience, and necessity, but this reference to safety stands practically alone in the opinion. The only other reference, even by inference, to safety matters is found in the summary of that portion of Exhibit 2 which is directed to the economic justification for the separation, and where an item reporting the "annual accident damages" paid by the railroad is included. It appears that the average annual cost for the twenty-five years covered by the study was \$475, which shows that at Los Feliz crossing serious accidents almost never occur. This conclusion is borne out by Exhibit 2 itself (at pp. 28, 30) where it is shown that only fourteen accidents occurred at the crossing, in a period of more than 25 years, and that only ten personal casualties were involved.

It is clear that this is a case where safety considerations cannot possibly be relied upon as justifying the separation,

and that the Commission has made no attempt to rely upon them. Obviously an expenditure such as here contemplated, of practically one and one-half million dollars, would not be warranted in the interest of eliminating minor accidents occurring at the rate of about one each two years, or personal injuries at the rate of about one every three years; and it follows that the Commission erred in relying here upon decisions of the Supreme Court of United States in which accident elimination and safety considerations formed the principal basis for its approval of state action imposing upon the railroads the major portion of the cost of grade-crossing separations, because such decisions are not in point or even persuasive.

The Commission's citation of these decisions demonstrates indeed the completely arbitrary character of its approach to the fundamental questions presented in this case, and warrants the conclusion that it was determined, regardless of controlling authority, to reject the benefit principle and revert to the mere rule-of-thumb method of allocations often followed before the benefit principle had been evolved and accepted.

Under the decision in the *Walters case*, the Commission's action in assessing half of the cost against petitioner, without regard to the benefit principle, clearly constituted a violation of petitioner's rights under the due-process clause of the Federal Constitution. The Commission, in short, erred in much the same manner as the Supreme Court of Tennessee, whose judgment was reversed in that case, in that the Commission here refused "to consider whether the facts relied upon by the railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."



Particularly significant in this connection is the comment of the United States Supreme Court already quoted from the *Walters* opinion that the promotion of public convenience (the sole primary end sought in the case at bar) will not justify requiring the expenditure of money by a railroad, any more than by others, unless it can be shown that a duty to provide the particular convenience rests upon it. In the present case, safety having been adequately assured, no particular duty rests upon the petitioner to provide a more rapid or convenient roadway for the "vehicular public".

Moreover, since the due-process clause of the Constitution of this State is framed in language substantially identical to the Fourteenth Amendment, the principle of the *Walters* case equally establishes that petitioner's rights under the State Constitution are likewise infringed.

In the above specifications of errors it is also asserted that the Commission's action here imposes an undue burden upon interstate commerce, in violation of the Commerce Clause of the Federal Constitution, and the national transportation policy set forth in the preamble to the Interstate Commerce Act as amended in 1940. Controlling decisions of the United States Supreme Court make it clear that action by a state agency which results in the imposition of a direct and substantial burden of expense upon an interstate commerce carrier will, if not otherwise justified, be held to constitute a burden upon interstate commerce and as such, an infringement of the Commerce Clause.

In

*Kansas City Southern Ry. Co. v. Kaw Valley Drainage District* (1914), 233 U.S. 75, 58 L. ed. 857,

it was held that an order by a state agency for the removal of a railroad bridge across a navigable stream was a direct

interference with commerce and therefore invalid; this even though the understood purpose of the order was actually to compel the railroad to elevate its bridge, with the approaching tracks, so as to lessen the danger of floods. The Court held that this direct interference with and regulation of a subject matter committed by the Constitution to the exclusive control of Congress could not be avoided by the State,

"by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases) . . . Furthermore in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helped by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass." (Emphasis added.)

In

*St. Louis & San Francisco Ry. Co. v. Public Service Comm.* (1921) 254 U.S. 535, 65 L. ed. 389,

the Supreme Court held invalid an order of the Missouri Public Service Commission requiring the railway to reroute two of its through mainline passenger trains, so as to serve directly an intermediate city of about 4,000. It was shown that that city was already served by some seven daily trains

each way, some of which made connections with through trains at a nearby junction. The order was challenged as a direct interference with and burden upon interstate commerce, in violation of the Commerce Clause. The Court said (p. 537):

"Considering the facts disclosed, we think it plain that the fourteen local passenger trains meet the reasonable requirements of Caruthersville, and that the Commission's order unduly burdens interstate commerce. Compliance with it would require the railway to maintain 16 more miles of track at the high standard essential for the through trains, and to move the latter 10 miles further, with consequent delay and inconveniences all along the line. The burden certainly would not be less serious than those which were condemned in some, if not all, of the causes above referred to."

In *Southern Pacific Co. v. Arizona* (1945), 325 U.S. 761, 89 L. ed. 1915,

the Supreme Court held invalid, as a violation of the Commerce Clause, the Arizona statute forbidding the operation in that State of freight trains of more than 70 cars, or passenger trains of more than 14 cars. It was shown that there was not only a physical interference with the operation, in the sense that more trains were operated than would have been otherwise required, but also that the direct expense of compliance with the statute was considerable, amounting in fact for the two principal railroads traversing Arizona (the present petitioner, and the Santa Fe) to about \$1,000,000 per year. Referring to this and the other effects of the law, the Supreme Court said (at p. 773):



"The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant."

After citing various cases holding that a state may not interfere with or regulate interstate commerce so as substantially to affect its flow, including both the *Kansas City Southern*, and *St. Louis & San Francisco R. Co. cases, supra*, as well as many others, the Court concluded (pp. 781-782):

"Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident." (Emphasis added).

It is here undisputed that petitioner is a common carrier in interstate commerce, and that its line crossing Los Feliz is a portion of one of its main routes used in such commerce. The additional burden of capital expense imposed upon petitioner by the Commission's decision, if the same is allowed to stand, amounts to \$627,260, the difference between \$746,600, representing 50% of the total allocated cost of the separation, and \$118,340, the capitalized equivalent of the annual net benefit of \$5,917, accruing to petitioner from the separation. These several amounts (other than the difference, obtained by mere subtraction) are set forth in the Commission's decisions under review, and are not disputed.

It cannot be questioned that the imposition of an unjustified capital expenditure of more than \$600,000 has a seriously adverse effect upon the *efficiency and economy* of petitioner's operations; and certainly in this case this

expenditure is not in any sense "essential for safety", inasmuch as the undisputed record shows that virtually no safety problem is presented at the Los Feliz crossing, and that the proposed separation is not even pretended to be necessary in the interest of safety.

The amount here at stake apparently is comparable to that involved in the *Kansas City Southern Case*, and perhaps somewhat greater than in the *St. Louis & San Francisco Case*. It is of course less than the approximate half-million dollars per year of the *Arizona Case*. Nevertheless, the principle is not governed solely by the amount involved. Any substantial imposition for which no reasonable basis is shown is a burden upon commerce and as such is invalid.

In the *Eric Case*, *supra* (254 U. S. 394, 410-411), the court included the following comment:

"If it reasonably can be said that safety requires the change, it is for them (the states) to say whether they will insist upon it, . . . If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

After the *Eric case*, the railroads (with the authority of the Interstate Commerce Commission) did in fact abandon much of their unprofitable mileage, particularly of branch lines. In many instances, the railroads actually abandoned lines rather than pay the enormous costs involved in grade separations. With this background in mind, the reasons for the adoption of the National Transportation Policy in 1940 can be more readily understood. The Act of September 18, 1940, Chap. 722, Title I, Sec. I, 54 Stat. 899, amended the Interstate Commerce Act by inserting before Part I thereof

the following provision entitled "National Transportation Policy":

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis added.)

Thus this Court is faced with a specific change in policy, adopted in view of the existing body of the law, which includes of course the *Erie case*. Petitioner submits that it is no longer the doctrine of this government that a railroad may quit if it cannot meet the high cost of grade separations where a large proportion of the costs are allocated to the railroad. On the other hand, Congress has stated it to be the policy of the government to preserve a national trans-



portation system by rail to meet the needs of commerce of the United States, of the Postal Service, and of the national defense. It is further provided in the National Transportation Policy that it should be recognized that the transportation services promoted should be economical, and that sound economical conditions in transportation should be fostered.

The Supreme Court of the United States, in *Scherabacher v. U.S.* (1948), 334 U.S. 182, 92 L. ed. 1305, said of the National Transportation Policy:

"\* \* \* This Court has recently and unanimously said in reference to this Act, 'Congress has long made the maintenance and development of an *economical and efficient* railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, *ante*, 580, 68 S.Ct. 426." (Emphasis added.)

See also:

*Interstate Commerce Commission v. Parker* (1945), 326 U.S. 60, 89 L.Ed. 2051.

The Commission's action in the present case must be considered in connection with other grade separation projects not only in California, but also other states. The petitioner operates in seven Western states, including California, and is called upon by these states and their political subdivisions to contribute toward grade-separation construction. Reports of the Commission disclose that in California alone it would cost two and one-half billion dollars to separate all the grade crossings in the state. The Southern Pacific is being called upon to contribute toward the construction of numerous such projects. It is reasonable to conclude that as auto-

mobile and truck registrations mount and highway construction doubles and triples as it has in recent years and, as materials shaft at delay, the pressure for new grade separations will increase. It is also apparent that tremendous burdens will be cast upon the railroads if by some arbitrary formula unrelated to benefits they are compelled to contribute 50% or more of the costs of building these new and expensive separations. The imposition of such charges, without regard to benefit, will constitute intolerable burdens upon interstate commerce. The decisions in *Penn. Railroad Co. v. Driscoll*, 188 Atl. 130, 9 A.2d 621, 41, stand for the proposition that if the costs of compliance with the legislative mandate are arbitrary, and unreasonably oppressive, then the mandate is void.

In the light of the *Arizona Case*, and the other decisions cited, this Court should hold that the challenged order places a direct and unwarranted burden upon interstate commerce, and is therefore void as an infringement of the Commerce Clause.

## II.

**BECAUSE OF ALLOCATING SUCH EXCESSIVE AND UNRELATED COSTS TO BE PAID BY PETITIONER, THE COMMISSIONER'S ORDER IF ENFORCED WOULD REQUIRE PETITIONER TO INCREASE ITS COMPETITION, AND TO HARM ITS OWN BUSINESS CORRESPONDINGLY.**

This section relates to both passenger vehicles and trucks, at both the proposed separation on Los Felix and the intersection of Los Felix and San Fernando Road.

The uncontradicted evidence is that Los Felix is a major traffic artery on the master plan of highways of the County

of Los Angeles, the City of Los Angeles and the City of Glendale, and has always been considered a place where traffic of major importance to the metropolitan area will flow in increasing volume. (Rep. Tr. p. 23, l. 14-30). A substantial volume of vehicular traffic that originates or terminates in the metropolitan area of Los Angeles uses Los Felix enroute to Antelope Valley, and also the Palm Springs area (Rep. Tr. p. 30, l. 9-18). Los Felix is also used to reach U. S. Highway 99 and State Route 40, leading to the interior valleys (San Joaquin and Sacramento Valleys) in California (Rep. Tr. p. 30, l. 9-18) and the San Francisco Bay area.

Many changes now in progress, and other contemplated additions to the highway system in the Los Angeles area, will increase the flow of traffic across Los Felix. The Principal Traffic Engineer of the City of Los Angeles pointed out that there are many things transpiring at present that will increase the vehicular use of Los Felix (Rep. Tr. p. 185, l. 7-26). These matters include, (1) change of traffic trends due to the completion of the Hollywood Freeway (a state highway), (2) the building of the Riverside Freeway (a state highway), (3) the widening of Franklin and Western Avenues in the City of Los Angeles, several miles distant from Los Felix crossing, which avenues are presently bottlenecks. These avenues constitute a by-pass, and their widening will remove physical restrictions on traffic from the west, the benches, and the north, to flow through Glendale over Los Felix (Rep. Tr. p. 196). This new construction in the City of Los Angeles will also divert to Los Felix traffic now using other crossings of the railroads (Rep. Tr.,



p. 197). All of this new construction, and widening of other highways, will result in additional vehicular traffic on Los Felix, and increase blocking at the intersection of Los Felix and San Fernando Road. It is obvious that a separation at Los Felix will be of benefit to this vehicular traffic that is being diverted to Los Felix, but of no benefit to the petitioner.

This use of Los Felix by vehicular traffic going to points served by passenger and freight service of the petitioner Southern Pacific Company in the Palm Springs area, the Antelope Valley, the San Joaquin and Sacramento Valleys, and the San Francisco Bay area, is such that if petitioner is called on to pay for the cost of construction any greater sum than the benefit that accrues to petitioner, it will be subsidizing the persons who compete with petitioner, and the traffic moving over these competitive highway routes.

At present a great number of trucks use Los Felix crossing. In Exhibit 2 it was developed that during a typical week 589 trucks (in addition to an undetermined number of panel trucks) were delayed at the crossing (see also Exhibit 4, which disclosed substantially the same delay). Observations on two typical week days disclosed that an average of 1,017.5 tank trucks, truck and trailer combinations, and other trucks used the Los Felix crossing daily. These calculations exclude light panel trucks.

The development of a constantly expanding highway system has resulted in the continuous building-up of a highway transportation industry that is highly competitive with the petitioner as well as other railroads. This competition has taken away from the railroads their one-time virtual mo-

nopoly of the heavy, long-haul transportation field, and reduced their revenues proportionately. Any further improvement of the highway system in which Los Feliz is included will merely intensify the competition by improving the facilities made available to petitioner's competitors. The trucks, using Los Feliz (Rep. Tr. p. 28, l. 22-24) will not only themselves be benefited by the separation, but the benefit will extend to the trucks using San Fernando Road, (U.S. 99), located about 850 feet to the east and parallel to the railroad (Rep. Tr. 181). The record shows that when the crossing gates are down at Los Feliz, automobiles and trucks are backed up into the intersection at Los Feliz and San Fernando Road (Rep. Tr. p. 172), so as to cause a backlash and substantial delay (Rep. Tr. pp. 179-180, 186). San Fernando Road is the main truck artery leading from metropolitan Los Angeles to the Ridge Route, the San Joaquin and Sacramento Valleys, and the San Francisco Bay Region. To paraphrase the Court's comments in the *Walters* case, *supra*, when the separation is completed the trucks and passenger vehicles will be in a still better competitive position, at no expense to themselves, but at the substantial expense of the railroad.

The Principal Traffic Engineer of the City of Los Angeles testified:

"Q. In other words, the benefits to Glendale of a grade separation would be the elimination of the blocking at San Fernando Road; that is the principal additional benefits you think Glendale gets from the grade separation? A. Yes, and I think the State gets it because of the increased volume of traffic that they are able to move on San Fernando Road." (Rep. Tr. p. 191).

The Planning Director of the City of Glendale testified:

"Q. Will you explain the relationship of the grade crossing to San Fernando Road? A. The crossing is approximately 850 feet southwest of and at right angles, measure at right angles to the tracks from the railroad right of way. That situation is indeed serious from the standpoint of an arterial highway such as San Fernando Road and the effect that it has on the general movement of traffic in the neighborhood. Crews (Queues) of traffic a quarter of a mile long have stacked up on each side of the Los Feliz grade separation, with the result that San Fernando Road, a State and Federal highway, have had the traffic blocked—the congestion being felt not on Los Feliz alone but on the north and south traffic along San Fernando Road to such an extent that you can find congestion periods during peak hours three-quarters of a mile or more along San Fernando Road that are having trouble getting through. Not all of that, of course, can be attributed to the crossing, but a substantial portion of it. Anyone who has had the misfortune to be blocked behind even a momentary delay on San Fernando Road will realize that large volumes of traffic, the load on San Fernando Road is around thirty to forty-five thousand cars a day, only a momentary delay will create a long queue of congestion on the State Highway.

"Q. Occasionally, you said, the traffic backs up from the grade crossing to and across San Fernando Road?

"A. That is correct. There are signals there, but even the signals do not entirely clear the intersection at times of severe congestion." (Rep. Tr. pp. 69-70).

Exhibit 9 was introduced by the State of California, Department of Public Works, Division of Highways, to minimize the effect of delays to traffic at Los Feliz crossing upon



the intersection of Los Feliz and San Fernando. This exhibit covered only a two-day check. The statement of State Highway Department witness was:

"It is concluded that train movements across existing crossings do affect San Fernando Road traffic on occasions. These conditions are not regular in occurrence and are usually minor in effect."

The above evidence did not consider the effects as described by the other eye witness, nor did it take into account the new traffic which will be diverted into Los Feliz, as described by the Principal Traffic Engineer for Los Angeles.

In the light of the situation thus described by the witness, and apparently accepted by the Commission as being correctly stated, it is appropriate to refer to certain comments of the Court in the *Walters Case*, already quoted, but here again repeated because of their particular bearing:

"The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade is now of far greater importance to the highway users than it is to the railroad crossed. For the rail operations are few; those of motor vehicles very numerous."

In referring to the situation presented in that case, particularly the factor of competition of carriers by rail and carriers by highway, the Court also said (294 U.S., at pp. 426, 427-428):

"The new highway, paralleling lines of the Railway and intended for rapid-moving motor vehicles, will, through competition for both freight and passenger traffic, seriously decrease rail traffic and deplete the Railway's revenue and net earnings. Practically all vehicles moving upon it will directly or indirectly compete for traffic with the Railway. Buses will operate over the new highway in regular scheduled movements in the same way as passenger trains. Trucks, some of them 70 feet in length and many weighing with load as much as 50,000 pounds, operated by common carriers, by contract carriers and by private concerns, will compete for the most profitable classes of freight. The competition besides reducing the volume of traffic will compel reduction of rates.

How disastrously such competition will affect the Railway's traffic and revenues is shown by its own experience since the State commenced, with the aid of the Federal Government, a system of highways paralleling the lines of the Railway."

"While the Railway, the sufferer from the construction of the new highway, is burdened with one-half the cost of the underpass, the owners of trucks and buses and others, who are beneficiaries of its construction, are immune from making any direct contribution toward the cost. It is true that one-half of the cost is by law to be borne by the highway fund of Tennessee (except in so far as it may be covered by the Federal aid), and that the truck and bus owners and others contribute as taxpayers to that fund. But, while nearly 28 per cent. of the gross revenues of the Railway is required annually to pay the state and local taxes and the cost of maintaining the roadway acquired and constructed at its own expense, the state commercial motor carriers,

which are supplied by the State with the roadway on which they move, pay in state and local taxes not more than 7 per cent. of their gross revenues. The taxes laid upon truck and bus owners are clearly insufficient to pay their fair share even of the cost and maintenance of the highways which serve them."

It is of course true that the Court's comments above quoted do not apply with literal exactness to the Los Feliz separation. This is not a new highway paralleling the lines of petitioner, but is nevertheless an important improvement in a main artery which carries a substantial volume of directly competitive traffic. For it is still true here, as in the cited case, that petitioner is in competition with many of those who now use the Los Feliz crossing and will use the new underpass; and therefore petitioner, like the railroad appellant in the cited case, is in a very tangible way a sufferer from the proposed improvement rather than a substantial beneficiary thereof. The owners of the motor vehicles who will use the underpass are the primary beneficiaries; and to them should be added also those users of San Fernando Road (U.S. 99) who will be able to move along that roadway with less delay because the "back-lash" created by the Los Feliz grade crossing will be eliminated.

It is also true here that under the Commission's proposed apportionment of the costs, the owners of the highway vehicles who will be the beneficiary of the new underpass are immune from making any direct contribution toward the cost, except to the extent that some part of the motor-vehicle taxes paid by them as part of the purchase price of the fuel they consume may ultimately find its way into the funds to be contributed by the County of Los Angeles and



the Cities of Los Angeles and Glendale. Thus it is clear that petitioner, which under the order will be compelled to pay directly  $\frac{1}{2}$  (\$746,600) of the entire allocable cost of (\$1,493,200) of the improvement, will be thus contributing directly some \$627,000, or approximately 42% of the cost, for the primary benefit of the owners of the motor vehicles, who in many instances will use the structure in order to compete more efficiently with the petitioner. As already shown, the figure last cited represents the amount by which the 50% contribution (\$746,600) imposed on petitioner exceeds the calculated capital value of the benefits (\$118,340) accruing to petitioner if the separation is built.

### III.

#### **THE ORDERS OF THE COMMISSION, IF CONSIDERED AS A PURPORTED EXERCISE OF THE POLICE POWER, ARE UNJUSTIFIED AND UNREASONABLE, IN THAT:**

- (a) No Material Considerations of Safety of Persons or Property Are Involved, or Shown to Exist, in the Situation to Which Said Orders Are Directed;
- (b) Petitioner Has Not, by Any Act, Action or Omission of Its Own Created or Increased Any Hazard, Inconvenience, Obstruction, or Interference Affecting the General Public, or Those Portions Thereof Who Use the Los Feliz Crossing; Any Such Conditions, to the Extent That They May Exist, Having Arisen Out of Circumstances Wholly Beyond Petitioner's Control or Responsibility.

Note: The discussion in this subdivision covers also Specification of Error No. 7 set forth in the petition as follows: "7. The Commission's orders, in apportioning to petitioner 50 % of the cost of the proposed construction, are invalid and beyond the authority of the Commission, and the ultimate findings of fact on which such action is based are not supported by, and are contrary to, the evidence."

The specifications of error above are addressed directly to the Commission's adoption of and reliance upon the

"barrier" theory or concept, in arriving at the contribution to be exacted from the petitioner. The Commission's views are stated in the following language of the opinion in its Decision No. 47420 previously quoted but here repeated for convenience:

"While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad." (Appendix, p. 32.)

The exercise of the so-called police power to compel the railroad to contribute an amount far exceeding the benefits received, as in the case at bar, must rest upon findings, adequately supported by evidence, to the effect that either (1) public safety requires the proposed separation, or (2) the railroad has created or contributed to a situation where the convenience and necessity of the public are adversely affected.

It is quite true that, under the rule of many decisions (including those principally relied upon by the Commission in this and the companion decision (No. 47344) involving the Washington Boulevard underpass; e.g., the *Omaha*, *Erie*, and *Lehigh Valley* cases, *supra*), in a grade-separation case where safety is genuinely involved, and

need on that ground is shown for the separation, the railroads have been required to contribute far more than would be equitable if the allocations corresponded to the benefits. These results were no doubt traceable to the concept that the railroad was inherently a dangerous instrumentality, and should therefore be compelled *at its own cost* to safeguard the public, so far as possible. Compare the comments of the United States Supreme Court at page 429 of the opinion in the *Walters case*, particularly footnote No. 37.

However, the record here shows that in this case there is no basis for the assertion of the police power against the railroad, on the sole ground of public safety, and without regard to benefits. At the risk of repetition, we point out again that the record before the Commission not only fails to show the existence of any particular hazard at the Los Feliz crossing, but instead effectively demonstrates that in a practical sense, and with the existing protection, *there is no substantial hazard*. In fact, although about 27,000 highway vehicles *per day* (or more than a million a year) traverse the crossing, there have been but 14 accidents at the crossing in more than 25 years, and only 10 injuries to persons including 1 fatality. The mathematical risk of accident is thus so slight (about 1 to 1,750,000) as to be completely negligible. On these facts, it could not reasonably be contended that *public safety* requires the separation; and it is fair to say that the record indicates that no such claim has been seriously made. In its findings, the Commission does not include any separate mention of safety considerations. In fact, except for the inclusion of the word "safety" in a mere formal finding in the close of the opinion (Appendix, p. 32) that word does not appear at all in the



opinions, nor is any evidence relative thereto cited by the Commission, other than passing mention of the very small amount of "accident damages" (\$475) paid as an annual average by the petitioner.

It being clear that safety considerations would not and do not justify the imposition here of the major burden of cost upon the railroad the only other justification, even under the Commission's view of the police power, would have to be that the railroad has caused or contributed to an impairment of and interference with the convenience and necessity of the public.

On this point the evidence, and to some extent at least the Commission's own opinion, show:

(1) The railroad was in its present location many years before the roadway now known as Los Feliz was built or opened, even as a country road;

(2) The Cities of Glendale and Los Angeles, which formerly did not include the Los Feliz crossing, have extended their boundaries and grown to their present populations and areas, over the years since the railroad was constructed, but largely since 1920 and even to a major extent since 1940;

(3) Los Feliz has attained its present importance as a main artery between these cities, and a major cross connection between other important routes, as a result of this growth and development of the cities and the surrounding county territory, and entirely independent of any action by the railroad;

(4) The volume of automotive traffic on Los Feliz has greatly increased in the past 20 years, but the volume of traffic on the railroad, measured by the number of trains

and train movements across the crossing, has increased very little if at all, and for some years past has been practically constant;

(5) The increase in the highway traffic volume on Los Feliz has been due to, and essentially an incident of, the development and constantly increasing use of all types of motor vehicles, including highway motor trucks as well as ordinary passenger-type automobiles, and especially the widespread use of motor vehicles in Los Angeles County and Southern California generally.

On these facts it is clear that the railroad itself bears little if any responsibility for the creation of the conditions which are asserted to cause delay, and thus "inconvenience", to highway traffic at the Los Feliz crossing. The railroad did not seek to have the crossing installed; at most, it merely consented (Exhibits 13 & 14). While the railroad did encourage and promote the growth of the cities and the county, and no doubt has received some benefit therefrom, it can hardly be held to have been responsible for such growth.

Thus the second premise for the exercise of the police power to make this purely arbitrary allocation disappears, like the first, when the facts are fairly examined.

It should be added that the Commission does not make any specific finding, in Decision No. 47420, to the effect that petitioner is or was responsible for creating the conditions at the Los Feliz crossing now proposed to be corrected by the separation. However, that theory of railroad responsibility is inherent in the "barrier concept", and the resultant view (here followed by the Commission) that the police power may be resorted to, at the railroad's expense, in

order to remove the alleged "barrier". The Commission's adoption of the "barrier concept" in the present case is made evident by its reference to its recent Decision No. 47344, in the *Washington Boulevard case*, in which it refused, for apparently the first time since 1933, to be guided by the benefit principle, and reverted to the philosophy of its prior decisions in which the barrier concept was given weight.

It should also be understood that in arguing, as we do in this subdivision of this memorandum, that the asserted bases (of public hazard, and railroad responsibility for public inconvenience) for the barrier concept do not exist in this case, we do not in the least concede that that concept is or might be valid in some other grade-separation case. On the contrary, as previously emphasized we consider that the barrier concept is not a logical or satisfactory basis upon which either to decide whether a separation is needed, or to allocate its cost when built, because it fails to consider controlling economic factors, and conflicts with basic legal principles enunciated in the *Walters case*.

The history of what has been transpiring in the transportation industry in relation to the increase of population and urbanization is important in understanding the matters presented in this point.

The Stanford Institute's study relative to "The Railway-Highway Grade Crossing Problem" (to which previous reference has been made) contains a lengthy review of the "Background and Underlying Principles" of the "Development of Demand for Grade Crossing Improvements and Eliminations". In that discussion the following comments are included, in a section entitled "The New Demand—1920 to the Present":



"The period since 1920 has been one of tremendous economic growth for the United States notwithstanding the depression of the 1930's. Increased highway mileage and automobile usage were significant factors in this economic growth. The level of national income, as a measure of the economic well-being of the nation, is approaching three times the 1929 level. Population has increased about 45 percent. An increasingly larger percentage of that population is to be found in non-farm areas. Farm population declined 10 percent during the period, whereas non-farm population increased over 16 percent. This added further to traffic congestion in cities and their environs. A new demand for grade crossing improvements and eliminations developed during this period, based upon the public's desire for greater convenience in highway travel.

"Business and industry, which in the last thirty years have come to rely so heavily upon the highway system and automotive transport of materials and employees, have also experienced significant growth. The total number of business establishments in the nation has increased by over one-third since 1921. The number of gainfully employed workers has increased more than 50 percent. The number of employees in manufacturing plants is now about twice the number for 1921. The total value of manufacturing production is three times that for 1921. The dollar value of business sales has also increased many fold. The nation's industrial growth has brought about increased highway travel. This has resulted in increased demand for grade crossing improvements and eliminations based upon the factor of public convenience.

"It is clear that during the last thirty years there have been marked increases in business activity and population in the United States. In addition, tremen-

dom developments have occurred in the use of automobiles for both business and pleasure purposes. This has brought about increased congestion in and about the urban areas. During the same period of time, railway mileage operated decreased slightly. Furthermore, there has been a decrease in the number of passengers carried each year by the railroads. This came about because of the increased use of private automobiles, airplanes, and buses, which collectively have increased their passenger traffic many fold since 1921. The number of revenue tons of freight originated by the railroads has increased since 1921, but this increase has been less than 25 percent. Motor trucks now carry virtually all intra-city freight shipments. During the last decade, the number of revenue tons of carload traffic originated by Class I railroads increased about 45 percent, while the number of revenue tons of truckload traffic of Class I motor vehicles increased over 300 percent. The number of locomotives in service decreased by about 35 percent during the past thirty years. The number of freight cars in service decreased around 25 percent. Adjusting the number of freight cars for increased capacity per car shows a small decrease in total freight-car capacity."

(Note: The above statistical information is based upon the more precise statistics found in the following accepted source publications:

Statistical Abstract of the United States (1951—Seventy-Second Edition); published by the U. S. Department of Commerce;

Statistics of Railways in the United States. Published by the Interstate Commerce Commission;

The Economic Almanac of 1951-2. Published by the National Industrial Conference Board, Inc.)

The demand for railroads, their services, and the size of their system for serving the public has not increased at a rate proportionate to the increase in demand for trucks, automobiles, buses and highway facilities, nor to the rate of growth of the economy.

Moreover, it is probably reasonable to infer that the railroads have become fairly well settled in the location of their principal routes and trucks.

Two specific developments of the past decade that have had additional significance for the grade-crossing problem are worth noting. First, there has been a substantial trend toward the decentralization of industry. This decentralization has been characterized to a large extent by the establishment of production plants in relatively small communities. This decentralization has been impelled by a variety of economic reasons principal among which have been:

1. Potential transportation economies gained by better distribution of production facilities in relation to the location of raw materials sources and new expanding markets.
2. National defense considerations.
3. Solving an industrial labor problem by creating plant locations in close proximity to rural surroundings, thus permitting employees to escape from city residence with its relatively higher cost of living and greater congestion.

The industrial growth of rural, semi-rural, and suburban communities has had marked effects on the demands for highway facilities in these areas. The transportation demand has increased due to the flow of industrial materials in and out of such communities, movement of workers to and



from their work, increased levels of income of such communities permitting automobile ownership and use for business and pleasure driving, and growth of commercial and residential areas on contiguous lands to serve the growing industrial and commercial populations. These developments, particularly, have caused the opening of new railway-highway grade crossings and an ever-increasing use of already established crossings. They have magnified the importance of the grade-crossing problem, as but one phase of the entire highway transportation problem, i.e., the necessity for creating additional highway facilities to provide the capacity to carry the loads of traffic generated by the economy.

The second significant development of the past decade has been the growth of suburban areas on the borders of large cities. A large portion of such population is economically tied to the cities in terms of employment, cultural development, and social relationships. This trend has caused the growth of suburban residential developments, the increase in mileage of local access roads connecting with primary and secondary highways, and the establishment of suburban commercial and shopping areas. These developments have had a multiplied effect, each on the other, in increasing the demand for new highway capacity and grade-crossing facilities.

It is fairly clear that the principal causes for the opening of new grade crossings and the demand for improvement and elimination of existing crossings are to be found in the demands of highway users for increased highway capacity. The larger amount of the benefits from crossing improvements and eliminations have accrued to vehicle users and the general public. It is reasonable, therefore, that there has

been a tendency for the railway portion of such costs to decrease.

The conclusion to be drawn from the above is that in reviewing the Commission's exercise of the police power, this Court should consider the revolutionary changes incident to transportation, wrought in recent years by the widespread introduction of motor vehicles and the need of these motor vehicles for more highways, the change in character, construction, and use of highways, and the change in the occasion for elimination of grade crossings.

#### IV.

**THE ALLOCATION TO PETITIONER OF 50% OF THE COST OF SAID CONSTRUCTION IS PURELY ARBITRARY, HAVING NO EVIDENTIARY BASIS WHATSOEVER, AND IS WHOLLY UNRELATED TO ANY CONSIDERATION OR BENEFIT TO PETITIONER.**

The protection of the Fourteenth Amendment to the Federal Constitution against orders requiring railroads to eliminate grade crossings at unreasonable expense is real, and not to be lightly regarded.

*Lehigh Valley R. Co. v. Public Utility Commissioners*  
supra (278 U.S. 24, at p. 34).

In the instant case the authority of the Commission is derived from the California Constitution, Article XII, Sections 23-24, and from the Public Utilities Code, Sections 1202 and 1214. The Commission's authority is not absolute. The Commission cannot constitutionally assess any proportion of the costs of a grade separation to the railroad arbitrarily or unreasonably, or simply because in the exercise of its police power it is able to say that to some extent or to any

extent public safety requires the construction of larger underpasses. Exercise of the police power must be devoid of oppression, and must not amount to an improper or arbitrary infringement upon constitutional rights.

5 Cal. Jur., Sec. 106, p. 695.

In *Archer v. City of Los Angeles*, 19 Cal. 2d 19, at pages 23-24, it is said:

"The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. (*Gray v. Reclamation Dist.*, 174 Cal. 622.) (Citing cases.) In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (43 Sup. Ct. 158, 67 L. Ed. 322); *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (17 Sup. Ct. 581, 41 L. Ed. 979).)"

The police power is subject to constitutional limitations therefore: (1) it may not be exerted arbitrarily or unreasonably; (2) that when particular individuals are singled out to bear the cost of advancing public convenience, the imposition of costs must bear some reasonable relation to the evils to be eradicated, or the advantages to be secured.

*Nashville, C. & St. L. R. Co. v. Walters*, *supra* (294 U.S., at pp. 415, 429)

In the instant proceeding the "evil to be eradicated" is the counterpart of the "advantages to be secured"; i.e., the elimination of delay to vehicular traffic.



If the Commission's decision is based upon its police power, the order on its face is an arbitrary exercise of that power. It fixes the railroad's share of the cost in round figures, at exactly 50%. Nowhere in either the evidence or the Commission's opinion is there any indication that the Commission computed this percentage on any logical or reasonable basis; from all appearances the percentage was plucked out of the air as the Commission's idea of rough justice, based upon unknown standards, outside the record, rather than upon up-to-date methods of calculating the value of benefits flowing from the elimination of vehicular delays and crossing hazards. If the Commission's decision is to have a rational basis, the value of promoting public convenience (or safety) can not only be calculated with reasonable accuracy, but *must* be based upon evidence (*Southern Pacific Co. v. Railroad Commission*, 13 Cal. (2) 125). The Commission can and did so calculate in its decision in the *Goshen Junction case*, *supra*, wherein the sum apportioned to the railroad in a proceeding resulting in the closing of not one, but two, grade crossings was arrived at by capitalizing an amount measuring the annual benefits and privileges received by the railroad on a 6% basis. The result of this calculation was to charge \$15,000.00 to the railroad and \$340,000.00 to the public authorities (see Exhibit G, p. 95 of the Appendix).

The Petitioner respectfully urges the Court to consider that this monetary value can be figured on a reasonable mathematical basis, as the Commission did in the *Goshen case*, *supra*, and need not be arbitrarily guessed at, or assessed in round percentage figures (compare Exhibit 2, pages 28-32, and Exhibit 20). Moreover, the Public Utilities

Commission has sizeable funds (see *Budget Act of 1950, Statutes of California*, Chapter 2, p. 310, and *Budget Act of 1951, Statutes of California*, Chapter 1020, p. 2706, appropriating \$2,710,602.00 and \$2,687,791.00, respectively, for support of the functions of the Public Utilities Commission). The Commission has numerous engineers who can calculate and place in evidence the reasonable value of the benefits in grade-crossing separation cases; and they would have but little difficulty, so far as *safety* benefits are concerned, in a case such as this where the only substantial evidence shows that accidents at the crossing have been relatively few and the corresponding expense nominal. (See the *Annual Report of the Public Utilities Commission* for July 1, 1949, to June 30, 1950, page 97, which states that during the year 264 applications have required investigation and reports by the Engineering Section of the Transportation Department, and that among the matters covered are authorizations for the construction and protection of grade crossings and grade separations.)

It is obvious, therefore, that there is no necessity for an arbitrary determination of the amount, if any, which should be assessed against the railroad. On this particular phase of the problem petitioner submits that the imposition of 50% does not bear a *reasonable*, or any, relation to the "evils to be eradicated", or the "advantages to be secured" in the existing situation.

The Commission in its opinion (Appendix, p. 32) recognizes that its authority to apportion costs is found in Section 1202 of the Public Utilities Code. Certain language in that Section should be closely examined. Section 1202(c) provides:

"The Commission has the exclusive power: (c) . . . to prescribe the terms upon which such separation shall be made and the proportions in which the expense . . . shall be divided . . . between such (railroad) corporations and the state, county, city, or other political subdivision affected."

Can the Commission arbitrarily apportion the expense? Can the Commission arbitrarily apportion the cost 50% on the railroad and 50% on the municipal corporations? What yardstick shall be used? It is elementary that the Commission cannot act arbitrarily.

After referring to the "benefit" principle in language already quoted at length, the Commission went on to conclude:

"Therefore, in view of all the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable costs . . . Southern Pacific Company should bear 50 per cent . . . the County of Los Angeles 25 per cent . . . and the Cities of Glendale and Los Angeles 12½ per cent each . . ."

Obviously the Commission was using no yardstick. There was nothing to support such a finding, except the reference to the police power. How can the Commission reach such a percentage?

Brief reference has already been made to the comprehensive report of the Stanford Research Institute, published under date of May 1, 1952, entitled, *"The Railway-Highway Grade Crossing Problem."* The purpose behind this report is stated in its Preface, as follows:

"The grade crossing problem is of major importance to the railroads, motor vehicle users, and the general



public. In many instances, all of these groups are required to participate in the cost of grade crossing improvements and separations. A question often arises as to the relative financial responsibility of each group for specific improvements.

"The Stanford Research Institute recognized in late 1950 that this problem required some organized research effort in order to permit development of a sound public policy by agencies concerned with grade crossing improvements and eliminations. Throughout 1951 and early 1952, the Institute engaged in a study of the problem with particular reference to the California situation. The results of this study are being made available in this report. It is being released as a part of the Institute's continuing program of public service research.

"This report deals with economic aspects of the grade crossing problem. It makes no attempt to cover the many political and sociological problems involved in highway projects generally and in grade crossing projects particularly. The overall objective of the report is to set forth sound economic principles applicable to the grade crossing problem. Often adequate data are not available upon which to base factual conclusions. In such cases, the report presents the economic reasoning supporting the conclusions as stated . . ."

"... The Stanford Research Institute hopes that this report will be of some assistance to the transportation industry, government agencies, and the public in their consideration of the grade crossing problem." (Page iii)

In Part 2 of the report, at p. 44, under the heading "Approaches to Evaluating Grade Crossing Projects" the following conclusions are stated:

## ALLOCATING COSTS FOR GRADE CROSSING PROJECTS

1. All grade crossing improvements and eliminations provide joint services or products for motor vehicle users, the railroads, and the general public.
2. The costs of grade crossing improvements and eliminations are joint costs.
3. When products or services are produced jointly, their costs are joint and cannot be allocated directly to each product. In such cases, joint costs can only be distributed in accordance with the relative demand for the products or services.
4. The relative demands of the several beneficiaries for the services of grade crossing improvements and eliminations should determine the distribution of the total (joint) costs of the projects among the beneficiary groups.
5. The relative demands of the beneficiary groups should be measured by the relative value of benefits each receives from the grade crossing projects.
6. There is no essential difference in sound principles of cost allocation between (a) grade crossing improvements, (b) separations, and (c) opening and closing of crossings.
7. Any distribution of costs based upon whether the highway or railway was first located at the crossing is not economically sound.
8. Almost all states have statutes either fixing the distribution of costs for crossing projects or vesting the power to do so in a public body.
9. Two significant tendencies have developed over recent years in distribution of the costs for grade crossing projects. First, the percentage of total costs assigned to railroads has declined. Second, state laws are providing increasingly for distribution of costs on the basis of benefits received.

10. The United States Supreme Court has formally recognized the validity of distributing costs for grade crossing projects among beneficiary groups on the basis of relative benefits received.

11. The policy of distributing costs for projects undertaken with Federal-aid funds by assigning arbitrary values of benefits to the railroads and to the general public is economically unsound.

12. Prior to 1933, the California Public Utilities Commission assigned costs for projects to the railroads and the public generally on a fifty-fifty basis. Subsequently, the Commission adopted the benefit basis for cost distribution on crossing projects.

13. In 1942, the California Public Utilities Commission gave evidence of reverting to its earlier unsound fixed-percentage basis of cost assignment on grade crossing projects. The particular case reflecting the change in Commission policy was presented for a rehearing, and no decision on the rehearing has yet been rendered by the Commission."

The report then points out (at p. 47):

#### **FIXED-PERCENTAGE BASIS NOT SOUND**

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings. Economic variations relating

---

\*This reference is to the *Washington Boulevard* case, in which the Commission's decision on rehearing was rendered June 24, 1952 (Dec. No. 47344). That decision is now before this Court on petition for review: S. F. No. 18671.



to various grade crossings are so great that a fixed percentage basis of cost allocation cannot be economically sound."

The report then adds the following comments (pp. 48-49):

### THE SUPREME COURT ON COST DISTRIBUTION

"Legal responsibility of the railroads for assuming costs on grade crossing projects was defined by the Supreme Court in a 1914 ruling based, of course, upon economic conditions in existence at the time.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways ..."

"In another 1914 case, the same court said:

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is . . . deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court . . . (citing cases.)"<sup>10</sup>

"Under these decisions it may be inferred that there is no legal limit to the portion of the total costs for grade crossing improvements and eliminations which may be assigned by public bodies to the railroads.

<sup>9</sup>*Chicago, M. St. P. R. Co. vs. Minneapolis, supra.*

<sup>10</sup>*Missouri Pacific R. Co. v. Omaha, supra.*

These cases were, however, predicated upon a different set of economic facts than exists today. The requirement for grade crossing improvements in 1914 was a requirement for increased public safety, and not basically a demand for increased free flow of traffic at crossings as is the case today.

"Freund has made the following observation:

"It is an elementary principle of equal justice that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. The principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the danger to the public welfare or the public burden which is sought to be avoided or relieved."<sup>11</sup>

"The Supreme Court, while recognizing the regulation of grade crossings as a legitimate exercise of the police power of the states, has indicated that this power is subject to a constitutional limit and that it may not be exerted arbitrarily or unreasonably. The court, in a 1935 case involving allocation of costs of a grade crossing elimination took into full account the change in economic conditions since its earlier decisions. It also recognized the necessity for justifying a burden on the railroads for such costs. The Court said:

"The railroad has ceased to be the prime instrument of danger and the main cause of accident. It is

<sup>11</sup>Ernst Freund, *The Police Power*, p. 635.

the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal aid system . . . highways . . . served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under these conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then it was reasonable to impose crossings; and the imposition was rarely a hardship. . . . The need for eliminating existing crossings and the need of new highways free from grade crossings arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident to the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing . . . (modern) highways . . . is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads. . . . The avoidance . . . (by grade separation) of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed, for the rail operations are few, those of motor vehicles very numerous.<sup>12</sup>

"This position by the Supreme Court indicates the legal as well as economic necessity for taking into account the reasons for grade crossing improvement and elimi-

<sup>12</sup>Nashville, C. St. L. R. Co. vs. Walters, *supra*.



nation projects, and for considering relative benefits, in distribution of costs for grade crossing projects."

The report also includes the following comments (at p. 16) under the topic:

**"ACCIDENTS AS A BASIS FOR JUSTIFICATION OF GRADE CROSSING PROJECTS":**

"1. Public safety remains the publicized basis of demand for railway-highway grade crossing improvements or eliminations, although the principal basis is actually the demand for greater conveniences in highway travel.

2. If only public safety were involved, adequate protection (except against careless drivers) could be obtained in most instances at less cost by installing highly effective protective devices than by constructing separations.

3. Grade crossing accidents in the United States have decreased slightly since 1934 even though there has been an increase in the number and use of motor vehicles on the highways. There has been a marked tendency toward relative improvement in the hazard situation.

4. Grade crossing accidents in the nation as a whole are not overly significant when compared with total highway accidents. Grade crossing accidents in California have in recent years declined in significance relative to total highway accidents.

5. Most highway accidents result basically from increased highway travel, inadequate highway capacity, and lack of caution by motor vehicle drivers.

6. The reduction of highway accidents involves three approaches: (a) additional safety provisions in vehicle construction, (b) regulation of highway use

and education of users, and (c) design and construction of highways to provide additional built-in safety.

7. Motor vehicle users have a right to receive and public bodies a duty to provide adequate protection and warning devices at railway-highway grade crossings. If these warning and protective devices are provided but ignored, motor vehicle users should bear the economic responsibility for accidents."

When the Commission, in view of the record and its own acknowledgment (Opinion, p. 13, Appendix, p. 38) that a primary purpose of the proposed separation was to eliminate delay to vehicles, proceeded to apportion the cost at 50% to the railroad, the Commission acted arbitrarily, without authority of law, and violated the due process clause. We refer again to the pertinent language of the opinion in the *Walters case* (294 U.S., at pp. 428-429):

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it..."

and the Court's further statement that the railroad had no duty to provide separations, where the main purpose of grade separation was to further uninterrupted rapid movement by vehicle rather than the promotion of safety.

The Commission, in reverting to the 50 per cent formula, has simply shut its eyes to modern economic trends and the obvious directions of the Supreme Court of the United States. It has chosen to go backward rather than to progress.

The Commission therefore failed to pursue its authority, regularly or at all, so far as concerns the allocation of costs

between the parties and acted beyond the scope of its authority; and its order in the circumstances amounts to confiscation, in violation of the due process and other clauses of the Constitution of the United States and of the State of California.

In addition, the Commission in apportioning costs on a 50% basis acted so arbitrarily and unreasonably as to deprive Southern Pacific Company of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution and Article I, Sections 13 and 14 of the California Constitution. (*Nashville, O. St. L. R. Co. vs. Walters*, supra; *Southern R. Co. vs. Virginia*, 290 U.S. 190, 78 L. Ed. 260).

Such action, because of its arbitrary character, also amounts to an undue burden on interstate commerce in violation of the commerce clause of the Federal Constitution, and violates the policy in favor of economical railroad operation, set forth as the National Transportation Policy (54 Stat. L. 899).

#### V.

THE COMMISSION IN ITS ORDERS AND DECISIONS HEREIN HAS FAILED TO FIND ULTIMATE FACTS ON MATERIAL ISSUES, HAS MADE FINDINGS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND FURTHER HAS MADE FINDINGS CONTRARY TO THE EVIDENCE, AND THUS HAS DENIED TO PETITIONER ITS CONSTITUTIONAL RIGHTS TO DUE PROCESS.

(a) The Finding with Respect to Public Safety is Unsupported by the Evidence, and Such a Finding is Therefore a Denial of Procedural Due Process.

The only finding of the Commission in which "safety" is mentioned is contained in a one-sentence paragraph (on p. 13, lines 13-22). The material portion of that finding reads:



"We hereby find it to be in the interest of public safety, convenience and necessity and that it would be practicable to require the construction of a grade separation." (Emphasis added) (Opinion, p. 13, Appendix p. 32)

The trains crossing Los Felix operate at slow speeds (Rep. Tr. p. 67). The passenger trains stop at Glendale station located a short distance south of Los Felix (Ex. 19 and Rep. Tr. p. 67). The outbound freight trains are ascending a grade and operate at slow speed (Rep. Tr. p. 67); while the inbound trains are also going slowly (Rep. Tr. p. 67), preparatory to entering the yard (Rep. Tr. p. 67). Los Felix is protected by 24-hour manually operated gates (Exs. 2, 19 and 20), so designed and operated as to afford virtually complete safety (Rep. Tr. pp. 248-50).

Evidence relating to public safety is also found in Exhibit 2 (See Appendix pp. 88-91), which was an Engineering Study participated in by all interested parties under the supervision of the Commission's Chief Engineer. In Part V thereof, entitled "Economic Justification For The Separation," (pp. 28-32; Appendix, pp. 88-91) there appears the following:

"The Los Felix Boulevard grade crossing is now protected by manually operated crossing gates over the entire 24 hour period. The accident record during the period January 1, 1926 to March 31, 1951, is shown on accompanying table, there being a total of 14 collisions between trains and automobiles at this crossing in the last 25 years resulting in one death and nine injuries." (p. 28 of Exhibit 2; p. 87 of Appendix).

The total accident damage paid by the railroad averaged \$475 a year (Ex. 20). This phenomenal safety record, where

27,000 vehicles are presently using the crossing each day, clearly points out that public safety considerations cannot possibly be relied upon as justifying the separation. The fact that the evidence does not justify a finding that public-safety requirements support the proposal was also discussed in Subsection I of this Memorandum (pp. 42-44).

The sole justification for the proposal urged before the Commission was that the separation would eliminate vehicular delay. A portion of the evidence of the Planning Director of Glendale summarized the reasons for the separation as follows:

*"that the substantial delay, inconvenience and losses of time and money be eliminated."* (Rep. Tr. p. 21, lines 20-22). (Emphasis added).

The controlling motivation for a grade separation was well set forth in a question directed to and answered by the principal Traffic Engineer of the City of Los Angeles, as follows:

*"Q. In other words, the benefits to Glendale of a grade separation would be the elimination of the blocking at San Fernando Road; that is the principal additional benefits you think Glendale gets from the grade separation? A. Yes, and I think the State gets it because of the increased volume of traffic that they are able to move on San Fernando Road."* (Rep. Tr. p. 191, lines 14-19).

The significance of the factor of vehicular delay was, as already shown, especially recognized in the *Walters* case (294 U.S., at p. 421-2, 79 L. ed., at p. 959) where the Court said:

"The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles." (Emphasis added).

The Court also commented (at pp. 415-416):

"Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the state in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court obviously erred in refusing to consider them." (Emphasis added).

and (p. 428):

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway established as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

The finding of "public safety" is not supported by the record. The most that the evidence shows is that the separation will eliminate delays to vehicles at the Los Feliz crossing and along that route (Ex. 2, Appendix pp. 86-91). Evidence relative to vehicular delay furnishes no support to a finding relative to public safety.

Section 1760 of the Public Utilities Code provides that where it is claimed that an order of the Commission violates rights under the Federal Constitution,

"the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."



This statutory provision, requiring this Court to exercise an independent judgment of the law and the facts where rights under the Constitution of the United States are asserted but have been denied, is in conformity with the controlling rule declared in numerous decisions of the United States Supreme Court:

*Bluefield Co. v. Pub. Serv. Comm.* (1923), 262 U.S. 679, 67 L. ed. 1176;

*Ohio Valley Co. v. Ben Avon Borough* (1920), 253 U.S. 287, 64 L. ed. 908;

*Oyama v. California* (1948), 332 U.S. 633, 636; 92 L. ed. 249;

*Niemolko v. Maryland* (1951), 340 U.S. 268, 271; 95 L. ed. 267;

*American Toll Bridge Co. v. Railroad Com.* (1938), 12 C.2d 184, 191-4; aff. 307 U.S. 486; 83 L. ed. 1414;

*Alabama Public Service Commission v. Southern Railway* (1951), 341 U.S. 341, 348, 95 L. ed. 1002,

1008 (A similar state statute and state court holding that the state court would independently re-

view both laws and facts in an appeal from the Commission were approved, and the Court then

held that a utility could not relitigate the factual question in a separate suit (to enjoin the Com-

mission) in the District Court);

*Southern Calif. Edison Co. v. Railroad Com.* (1936), 6 C.2d 737, 744; 59 P.(2d) 808;

*Laisne v. Cal. St. Bd. of Optometry* (1942), 19 C.2d 831, 843; 123 P.(2d) 467.

Further, as far as the law of the State of California is concerned, there "must be sufficient competent evidence" to support the findings of the Commission:

27 Cal. Jur. 575;

2 Cal. Jur. (2) 382 (Note 14);

*Southern Pac. Co. v. Railroad Com.* (1939), 13

C.2d 125, 127-8, 87 Pac. (2) 1052.

Such evidence is lacking in the record as far as safety is concerned, both as to competency or sufficiency. The bare finding of "public safety . . ." cannot be supported by the record, either upon examination to see if the evidence in the record sustains such a finding, or upon this Court's exercise of an independent judgment of the facts (Public Utilities Code, Sec. 1760; *Nashville C. & St. L. Ry. v. Walters*, *supra*).

Since the Commission's finding of "public safety" is not supported by substantial evidence, the finding of the Commission on this topic is null and void, and petitioner was not accorded a fair hearing in that the guarantee of procedural due process was violated (*Southern Pac. Co. v. Railroad Comm.* (*supra*), 13 Cal. (2) 125.

**(b) The Absence of Findings on Material Issues Requires That the Decisions Be Set Aside.**

The method adopted in the Commission's Opinion and Decision No. 47420 (Appendix, pp. 19-36), of reciting and summarizing evidence of a particular witness, without stating any conclusion on that evidence, makes it exceedingly difficult, if not impossible, to ascertain just what the Commission was attempting to find in the way of facts to support its decision.

In this respect the Opinion and Decision in the present matter resemble those so aptly described by this Court in *Southern Pac. Co. v. Railroad Comm.* (1939), 13 C.2d 125, 127, 87 P.(2d) 1052, as follows:

"... its ruling, which includes a commingling of argument, findings of fact and conclusions of law..."

The Commission in the present case not only used a similar form for its ruling, but also interspersed summaries of the evidence of some of the witnesses and exhibits into its present Opinion.

There is little statutory direction upon the subject of findings. Section 1705 of the Public Utilities Code provides:

"After the conclusion of the hearing, the Commission shall make and file its order, containing its decision."

Section 1757 of the Public Utilities Code provides in part:

"The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. *Such questions of fact shall include ultimate facts* and the findings and conclusions of the commission on reasonableness and discrimination." (Emphasis added.)

Thus it appears that the code contemplates that the Commission shall decide upon not only ultimate facts, but also questions of fact. (See also *Southern Pac. Co. v. Railroad Comm.* (1939), 13 C.2d 125, 129, and cases cited therein.)

The question of just what findings must be made by the Commission has not been fully explored by the Courts; although the above language of Section 1757 of the Public Utilities Code seems clear in requiring that the "questions of fact shall include ultimate facts". The use of the word



"include" presupposes findings of fact; otherwise, the word "include" would be meaningless.

In each type of case coming before it, the Commission has the duty of making findings of the character required by statute. (*So. Calif. etc. Lines v. Public Utilities Comm.* (1950), 35 C.2d 586, 592, 220 P.(2d) 393; *In Re Pacific Gas and Electric Co.* (1941), 43 C.R.C. 753, 757). Under Section 1063 of the Public Utilities Code (former Section 50¾ of the Public Utilities Act of 1915) it was held that specific negative findings need not be made (*So. Calif. etc. Lines v. Public Utilities Comm.* (1950), 35 C.2d 586, 593, 220 P.(2d) 393). The Commission must find upon the ultimate facts (*Oro Electric Corp. v. R. R. Comm.* (1915), 169 Cal. 466, 471, 147 Pac. 118).

In *Southern Pac. Co. v. R. R. Comm.* (1939), 13 C.2d 89, 108, 87 P.(2d) 1055, the Court in a rate case held that a finding of reasonableness met the requirement of the statute where:

"As repeatedly hereinbefore has been indicated, the commission made the finding 'that the reduced railroad rate . . . is *unreasonably low and not justified by transportation conditions.*' (Emphasis added.) And with respect thereto, specifically it is urged by the petitioner that, standing alone, without the presence of specific or essential findings upon which it must be made to rest, such 'finding' is insufficient. It is important to note that by the quoted language of section 67, the commission is authorized to include 'ultimate' facts in its findings and conclusions on *reasonableness* and discrimination."

(p. 113):

"In reliance upon the reasoning and the authorities that thus are cited in the Oregon case, together with a

consideration of the language used by the legislature of this state in its enactment of section 67, it is concluded that the finding here under discussion is not properly subject to the objections made by the petitioner, *provided, of course, that it has sufficient support in the evidence.*" (Emphasis added.)

In

*Southern Pac. Co. v. Railroad Comm.* (1939), 13 C. 2d, 125, 87 P.(2d) 1052 (cited *supra*),

this Court held that the Commission cannot disregard evidence and decide issues according to the Commission's own concept, saying (at p. 130):

"Although in the instant matter, in effect, the commission contends that regardless of the strength of evidence presented by the petitioner, and even in the absence of any evidence introduced to the contrary, the commission has the right to disregard the evidence and decide the issue according to its own concepts,—as a conclusion from the foregoing authorities it becomes apparent that the Railroad Commission has no greater authority than has the Industrial Accident Commission on questions of fact; and where, as here, all the evidence supports the petitioner's contention, and none has been adduced in opposition thereto, the ruling of the commission amounts to the making of an order by the commission without any evidence in support thereof."

The necessity for findings by an administrative agency may rest upon constitutional grounds (*Wichita R. & L. Co. v. Public Utilities Comm.*, 260 U.S. 48, 67 L. ed. 124; *Mahler v. Elby*, 264 U.S. 32, 68 L. ed. 549), or, as here, upon a statutory requirement. The basic purposes of findings are to aid the Court in determining whether there

is sufficient evidence as to support them (*Atchison, T. & S. F. Ry. Co. v. Commerce Comm.*, 335 Ill. 624, 167 N.E. 831); to enable the Court to examine the decision of the administrative agency in order to determine whether it is based upon a proper principle (*United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 79 L. ed. 1023); and to apprise the litigants or parties in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, upon what grounds (*Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86, 75 L. ed. 221). Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings (*Meeker & Co. v. Lehigh Valley R. Co.*, 236 U.S. 412, 59 L. ed. 644); (*Cantrell v. Board of Supervisors*, 87 Cal. App.2d 471, 197 P.2d 218).

As already emphasized, the Opinion of the Commission recites and summarizes the evidence of various witnesses, but does not embody any findings as to that evidence. It cannot be determined whether the evidence of these witnesses was approved or rejected by the Commission. This summary of the evidence is interesting reading, but it cannot be ascertained from either the Opinion, the Decision or the Order whether the Commission found the recited facts to be true or false.

It is submitted that the parties are entitled to know from the decision and order the facts found by the Commission, as well as ultimate facts (*N. C. & St. L. Ry. Co. v. Walters supra*). This method of summarizing the evidence, without making any finding as to the evidence recited, leaves the record of the proceeding barren so far as concerns find-



ings of fact other than perhaps ultimate facts. The statute provides the method and procedure for the review of decisions and orders of the Commission. The Commission should make a faithful effort to follow the statutes and cases upon the subject (*Southern Pac. Co. v. Railroad Comm.*, *supra*, 13 C.2d 125, 87 P.(2d) 1052), in order that the Courts may be able properly to review the Commission's decisions. For the Commission to refuse or omit to do so is arbitrary, unreasonable and oppressive, and amounts to a failure regularly to pursue its authority.

Neither the decision nor opinion finds as a matter of fact or ultimate fact that Los Felix is a road of considerable importance (Rep. Tr. p. 20) leading principally to many population centers in Southern California; that Los Felix is a major traffic artery, and a route over which traffic of major importance to the metropolitan area will flow in increasing volume (Rep. Tr. p. 23); that traffic from Antelope Valley to the Los Angeles Harbor (Rep. Tr. p. 26), and from the desert, beach and mountain areas (Rep. Tr. p. 29) uses Los Felix in large volume; that travel to and from the interior (Sacramento and San Joaquin Valleys) uses Los Felix (Rep. Tr. p. 30); that Los Felix is a very important segment of the Master Highway Plan (Rep. Tr. p. 27); that Los Felix is an important road (Ex. 2 and Rep. Tr. p. 185 and p. 195); although much evidence was introduced upon these matters. Further, neither the Decision nor Opinion includes a finding, in accordance with the evidence, that state gas tax funds will be used or are available to finance the project (Rep. Tr. p. 301-2).

Neither the Opinion nor Decisions find that the railroad has ceased to be and is no longer the prime instrument of danger, or the main cause of accident.

In addition, the Commission in its Decision and Opinion failed to find that the roadways involved are not feeders of rail traffic, and that the avoidance (by grade separation) of traffic interruptions incident to the Los Feliz crossing (at grade) is now of paramount importance to the highway users, but of no importance at all to the railroad.

The above omissions of findings of fact and ultimate fact compel the conclusion that the Commission has acted arbitrarily, and that petitioner has been denied a fair hearing, all in violation of the substantive or procedural due process of law required by the 14th Amendment to the United States Constitution and by Article I, Section 13, of the California Constitution (*Southern Pac. Co. v. Railroad Comm.*, *supra* (13 C.2d 125, 128-8, 87 P.(2d) 1052)). In fact, it is obvious the Commission has "disregarded the evidence and decided the issue according to its own concepts". This the Commission cannot do. The Commission must act upon evidence, and not arbitrarily (*American Toll Bridge Co. v. Railroad Comm.*, 12 C.2d 184, 83 P.(2d) 1).

### CONCLUSION

As stated at the outset of this memorandum, the issue here is not whether the Los Feliz grade separation should be built, but solely whether petitioner should pay a share of the cost far exceeding any possible, or even arguable, benefits it might receive.

The evidence shows that greater freedom of movement of highway traffic—that is, elimination of vehicular delay upon a major traffic artery—will result from the separation, and is the real and only purpose thereof. Petitioner cannot benefit in any way from this result; indeed, to the

extent that competitive traffic (including that moving in private automobiles) using Los Felix or other affected roadways is enabled by this improved facility to move faster or more cheaply, petitioner is damaged instead of benefited.

Petitioner's primary obligation at the crossing is to do its part in promoting the safe passage of highway traffic. The evidence, notably the actual experience at the crossing for the past 25 years, shows that this has already been fully accomplished. The proposed separation is plainly not required in the interest of safety; and consequently safety considerations cannot be urged as a basis upon which to compel petitioner to contribute to its cost.

Petitioner will benefit from the separation only to the extent that it will be relieved of the expense of maintaining and operating the safety devices now in use at the crossing damage payments for the accidents infrequently occurring at the crossing. These benefits are offset in part by the added expense of maintaining the bridge structure at the underpass. The capitalized equivalent of the net benefit is \$118,340; and this amount is the maximum which, under any view of the case, petitioner may be required to contribute.

In the light of the facts and the law, as developed in this memorandum, the Commission's order imposing upon petitioner the payment of the sum of \$746,000, more than six times the maximum possible benefit, is clearly unfair, unreasonable, arbitrary and burdensome.

It is elementary that petitioner, like any other citizen, may not be compelled against its will to contribute when it has no obligation, or to further the well-being of others (many of them actual or potential competitors) when the net result will be to its own detriment. It is equally well



established that the Commission, even though purporting to exercise the police power, may not act arbitrarily, or without adequate evidence to support its conclusions, or in such fashion as to deny due process of law or impose burdens upon interstate commerce.

The record shows that the decisions here under attack violate these basic principles. This Court should, therefore, issue its writ to review these decisions, and upon such review should order them annulled and set aside.

Respectfully submitted,

M. J. FOULER,

BURTON MASON,

RANDOLPH KARR,

*Attorneys for Petitioner*

September 12, 1952

San Francisco, Calif.

(Appendix follows)



## INDEX TO APPENDIX

EXHIBIT NO.	APPENDIX PAGE
A. Application of the City of Glendale No. 32385 to Public Utilities Commission to Authorize the Construction of a Grade Separation at Los Felix and Apportion the Costs.....	1
B. Order of the Public Utilities Commission Instituting Investigation as to the Necessity of a Grade Separation at Los Felix and the Apportioning of Costs (Case No. 5327) .....	17
C. Decision No. 47420 of the Public Utilities Commission Respecting Application No. 32385 and Case No. 5327..	19
D. Application of Southern Pacific Company for Rehearing of Decision No. 47420.....	37
E. Decision No. 47597 of the Public Utilities Commission (Order Denying Rehearing and Modifying Decision No. 47420) .....	84
F. Part V of Exhibit No. 2 Entitled in Part "Results of an Engineering Study" (of all parties) Respecting the "Economic Justification for the Separation" (pp. 28-32) .....	86
G. "List of Grade Separations Constructed in California, 1934-1950, Involving Southern Pacific Lines, Showing Apportionment of Costs and Basis Thereof".....	92
H. Summary of State Statutes and Practices in Respect to Cost Allocation.....	98
J. Summary of Facts .....	104



## **APPENDIX**

### **Exhibit A**

#### ***Before the Public Utilities Commission***

In the Matter of the Application of the City of GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the Southern Pacific Company, designating the portions of the work to be done respectively by said City, The City of Los Angeles and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

Application  
No. 32385

*To the Honorable Public Utilities Commission of the State of California:*

The petition of the City of Glendale respectfully shows:

#### **I**

The applicant is a municipal corporation of the State of California organized and existing under a freeholder's charter adopted and approved pursuant to the provisions of the Constitution of said State, and is hereinafter called "Glendale."

#### **II**

The City of Los Angeles is a municipal corporation of the State of California organized and existing under a freeholder's charter adopted and approved pursuant to the provisions of the Constitution of said State, and is hereinafter called "Los Angeles."

## III

The Southern Pacific Company, hereinafter called "Southern Pacific," is a railroad corporation as defined in the Public Utilities Act, which during all times hereinafter stated did and now does own, control, operate and manage a railroad as defined in said Act, consisting of two standard gauge main tracks, a standard gauge passing track and two standard gauge yard tracks [1\*] five tracks in all) along the boundary line of Glendale and Los Angeles, particularly across Los Feliz Road-Boulevard, one of the public streets of Glendale, at the place hereinafter described. (Los Feliz is designated a Road in Glendale and a Boulevard in Los Angeles, and is hereinafter called "Los Feliz.")

## IV

The crossing of said railroad and Los Feliz is designated in the files of your Commission as Crossing No. B-4763, and the legal description thereof within Glendale County of Los Angeles, State of California, is as follows:

That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, Page 214, and in Book 17837, Page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing within Los Angeles, County of Los Angeles, State of California, is as follows:

A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with

\*Numbers appearing in brackets [ ] indicate page numbers of original documents.

the southwesterly line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

## V

Los Feliz is the most important highway artery between the western portion of Los Angeles, including the Venice and Hollywood districts, and Glendale, Pasadena, and the unincorporated communities in Las Crescenta Valley. This street crosses the railroad of Southern Pacific at the boundary line of Los Angeles and Glendale. Southern Pacific's Glendale station is located about 1200 feet southerly from the Los Feliz crossing. Los Angeles has constructed a bridge at the point where Los Feliz [2] crosses the Los Angeles River, located about one-half mile to the west of the railroad with a 70-foot roadway and two five-foot sidewalks. Los Feliz between Riverside Drive in Los Angeles and the Southern Pacific tracks is improved with a 70-foot roadway. Easterly of the Los Feliz crossing Los Feliz is improved with a 76-foot roadway and two seven-foot sidewalks. Approximately 850 feet easterly of the Los Feliz grade crossing Los Feliz crosses San Fernando Road, a State highway which parallels the railroad in Glendale and Burbank.

## VI

Los Feliz is a heavily travelled street with approximately 26,000 vehicles passing over the Los Feliz grade crossing in a 24-hour period. The crossing has been the scene of many accidents, several of which have resulted in death and serious injuries to motorists and pedestrians. The view at the grade crossing is seriously impaired by buildings and



also at times by cars standing on the sidings. The crossing is now protected by crossing gates throughout the entire 24-hour period of each day. The gateman often experiences difficulty in operating the gates when traffic is heavy. It is not unusual for traffic to line up for a distance of a quarter of a mile or more waiting for the passage of a train. On occasions the traffic backs up and blocks the flow of traffic on San Fernando Road, a State highway.

## VII

The need for a grade separation at the Los Feliz grade crossing was recognized by your Commission in Decision No. 17330, rendered on September 10, 1926, when the Commission found that there was urgent public necessity for grade crossing relief and ordered that the crossing be abolished by the construction of a suitable subway. On May 28, 1934, due to inability of the parties to finance the cost of a subway, the Commission ordered the case dismissed. Since 1926 the number of motor vehicles passing over [3] the Los Feliz crossing has almost doubled, and during that period the number of trains operated by the Southern Pacific has increased materially.

## VIII

For the reasons above stated, the public need, safety, welfare and convenience require that a grade separation be constructed for the following purposes:

- (a) To permit Los Feliz to carry its normal traffic without the delays caused by the passage of trains;
- (b) To prevent traffic congestion and the blocking of traffic on San Fernando Road, a State highway; and

(c) To permit the public to receive and enjoy the full benefit of its present large investment in the traffic facilities afforded by the present improvements on Los Feliz.

### IX

In order to meet such present needs, it is necessary that an underpass be constructed at the present grade crossing with a total street width of at least 70 feet (preferably two 40-foot roadways separated by a median strip, as recommended in the report of the Public Utilities Commission to the Assembly of the State of California dated March 6, 1950, furnished in response to House Resolution No. 24 adopted December 19, 1949) and a five-foot pedestrian walk on each side.

### X

On the 2nd day of February, 1950, The Council of the City of Glendale adopted a resolution, a copy of which is marked EXHIBIT A and is hereto attached and made a part hereof. On the 15th day of June, 1950, The Council of the City of Glendale adopted Resolution No. 9264, a copy of which is marked EXHIBIT B and is hereto attached and made a part hereof. On the 23rd day of February, 1951, The Council of the City of Glendale adopted the attached motion, a copy of which is marked EXHIBIT C and is [4] hereto attached and made a part hereof.

### XI

Attached hereto and made a part hereof are the following exhibits:

EXHIBIT D. Map showing the location of all streets, roads, property lines, tracks, buildings, structures, and

other obstructions to view in the immediate vicinity of the Los Feliz grade crossing, and the width of the surface or pavement of Los Feliz adjacent thereto.

EXHIBIT E: Map showing the relation of the Los Feliz grade crossing to the existing arterial streets and the railroad in the general vicinity thereof.

## XII

No exhibit showing the ground line and grade line and rate of grades of approach on all highways and railroads affected by the proposed grade separation has been attached as required by Rules 30 and 31 of the Commission's Rules of Practice and Procedure, for the reason that detailed plans of the proposed grade separation have not been prepared. It is expected that the Commission will fix the responsibility for the preparation of such plans, and that the plans when prepared will comply with Commission requirements as to width and clearances.

## XIII

Relief is sought by applicant under Section 43 of the Public Utilities Act (Stats. 1915, p. 115, as amended).

## XIV

The principal place of business of applicant is 613 East Broadway, Glendale 5, California.

## XV

Communications in respect to this application are [5] to be addressed to Henry McClernan, City Attorney, 111 North Howard Street, Glendale 6, California.



**Appendix**

**7**

WHEREFORE, applicant respectfully prays for an order or orders of your Honorable Commission, as follows:

(a) Authorizing and requiring the construction of said grade separation;

(b) Designating the portions of the work of said construction to be done by Glendale, Los Angeles, and the Southern Pacific respectively;

(c) Fixing, determining and allocating the portions of the costs of said work which are to be borne respectively by Glendale, Los Angeles, and the Southern Pacific, and fixing the time and manner of payment thereof; and

(d) Authorizing, requiring or directing such other or further matters and things in connection with said work as may be appropriate.

CITY OF GLENDALE,  
a municipal corporation,  
*Applicant*

HENRY MCCLERNAN,  
*City Attorney*

JOHN H. LAUTEN,  
*Assistant City Attorney*

JOSEPH R. ROARK,  
*Deputy City Attorney*

By JOHN H. LAUTEN,  
*Assistant City Attorney*

*Attorneys for Applicant [6]*

the State of California, or other political subdivisions affected and

It is HEREBY FURTHER ORDERED that a hearing for the purpose of considering said matters be held before Commissioner Huls, and Examiner Syphers on the third day of October, 1951, at 10 a.m., in the Courtroom of the Public Utilities Commission, [1] Mirror Building, 145 South Spring Street, Los Angeles, California; and

It is HEREBY FURTHER ORDERED that the Secretary of this Commission serve, or cause to be served, a certified copy of this order upon each of the parties named herein at least five days prior to the date of hearing, it being found by the Commission that public necessity requires such shortened notice of time and place of hearing, and shall serve a copy of said order on all other parties interested in said investigation.

Dated at San Francisco, California, this 25th day of September, 1951.

R. E. MITTELSTAEDT

*President*

JUSTUS F. CRAEMER

HAROLD P. HULS

PETER E. MITCHELL

*Commissioners*

(Seal)

Certified as a True Copy

NOEL COLEMAN

*Asst. Secretary,*

*Public Utilities Commission*

*State of California [2]*

**Exhibit C**

Decision No. 47420

*Before the Public Utilities Commission  
of the State of California*

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

Application  
No. 32385

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.

Case  
No. 5327

*John H. Lauten, Assistant City Attorney, for the City of Glendale, petitioner. Randolph H. Karr, for Southern Pacific Company, respondent. Roger Arnerbergh, Assistant Attorney, for the City of Los Angeles*



State of California

County of Los Angeles—ss.

CHARLES B. BAILEY, being first duly sworn, says:

That he is an officer of the City of Glendale, a municipal corporation of the State of California, applicant herein, to wit: City Manager of said City;

That he makes this verification for and on behalf of said City for the reason that it is a municipal corporation as aforesaid;

That he has read the foregoing application and knows the contents thereof and that the same is true of his own knowledge, except as to those matters stated on information and belief and as to those matters he believes it to be true.

CHARLES B. BAILEY

Subscribed and sworn to before me  
this 1st day of May, 1951.

ARJUNA D. STRAYER

Notary Public in and for the County  
of Los Angeles, State of California

(Seal)

EXHIBIT A

RESOLUTION OF INTENTION  
WITH RESPECT TO UNDERPASSES

WHEREAS, House Resolution #24, adopted by the California Assembly on December 19, 1949, did request that the appropriate officials of the City of Glendale, City of Los Angeles, County of Los Angeles, Southern Pacific Company, and the Public Utilities Commission initiate proceedings for separation of grades at Los Feliz Boulevard and Brand Boulevard, in Glendale and Los Angeles, in Los Angeles County, at the track crossings of the Southern Pacific Company; and

WHEREAS, pursuant to this request of the Legislature, the Public Utilities Commission did call a meeting of the interested parties on Thursday, January 19, 1950, at the Commission's office in Los Angeles; and

WHEREAS, at this meeting it was determined that the expeditious handling of the request of the Legislature could be best accomplished by the appointment of sub-committees, each of which would analyze the projects from the various standpoints, and the Glendale representative has been appointed Chairman of the Finance Committee; and

WHEREAS, the method of financing of the proposed underpasses is considered the most difficult phase of the entire problem, as is evidenced by the Public Utilities Commission's action in 1934 of abandoning these projects at the request of the interested jurisdictions because of their inability to finance their proportionate share of the cost; and

WHEREAS, the Council of the City of Glendale desires at this time to express its intention of assuming its propor-

tionate responsibilities in financing the projects; now, therefore,

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF GLENDALE** that the Council will proceed in good faith to assume its reasonable proportionate share of the cost of one of the underpasses, and if possible both of the underpasses, by either submitting the proposition to the voters for a bond issue at the first available election following formal order of the Public Utilities Commission, or other appropriate means of financing as it deems fit when the need arises.

I, G. E. CHAPMAN, City Clerk of the City of Glendale, do hereby certify that the foregoing resolution was duly adopted by The Council of the City of Glendale, California, at a regular meeting thereof held on the 2nd day of Febry, 1950, and was adopted by the following vote, to-wit:

Ayes: Baird, Burkhard, Campbell, Wickham, Wright

Noes: None

Absent: None

(s) G. E. CHAPMAN

City Clerk of the City of Glendale

(Seal)



## EXHIBIT B

## RESOLUTION NO. 9264

**A RESOLUTION OF THE COUNCIL OF THE CITY OF  
GLENDALE REQUESTING THE PUBLIC UTILI-  
TIES COMMISSION OF CALIFORNIA TO INITI-  
ATE PROCEEDINGS ON ITS OWN MOTION FOR  
THE CONSTRUCTION OF A GRADE SEPARA-  
TION AT THE INTERSECTION OF LOS FELIZ  
BOULEVARD AND THE SOUTHERN PACIFIC  
RAILROAD TRACKS**

WHEREAS, the Public Utilities Commission of California, in Cases Nos. 2124 and 2171 decided in 1926, recognized that the public convenience and safety required the elimination of the grade crossing at the intersection of Los Feliz Boulevard and the Southern Pacific Railroad tracks in the City of Glendale; and

WHEREAS, the need for a grade separation has continued to this date and is increasing; and

WHEREAS, the Assembly of the State of California has heretofore requested the Commission to institute proceedings for the elimination of such grade crossing, Now, Therefore,

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF GLENDALE:**

**SECTION 1.** The Public Utilities Commission of the State of California is hereby requested to initiate proceedings on its own motion for the separation of grades at the intersection of Los Feliz Boulevard and the Southern Pacific Railroad tracks.

V

**SECTION 2.** The Council reaffirms its declaration of February 2, 1950 that it will proceed in good faith to provide for Glendale's reasonable proportionate share of the cost of such a grade separation if it is ordered constructed by the Commission as a result of such proceedings, by either submitting a proposition to the voters for a bond issue at the first available election following formal order of the Commission, or by other appropriate means of financing selected by The Council when the need for funds arises.

**SECTION 3.** The City Clerk is directed to certify to the adoption of this resolution and to transmit a certified copy to the Public Utilities Commission of the State of California.

Adopted this 15 day of June, 1950.

(s) **GEORGE R. WICKHAM**

**Mayor of the City of Glendale**

**Attest:**

(s) **G. E. CHAPMAN**

**City Clerk of the City of Glendale**

State of California  
County of Los Angeles  
City of Glendale—ss.

I, G. E. CHAPMAN, City Clerk of the City of Glendale, do hereby certify that the foregoing resolution was duly adopted by The Council of the City of Glendale, California, at a regular meeting thereof held on the 15 day of June, 1950, and that the same was adopted by the following vote:

Ayes: Baird, Burkhard, Campbell, Wickham, Wright

Noes: None

Absent: None

(s) G. E. CHAPMAN

City Clerk of the City of Glendale

I hereby certify that the foregoing  
is a true and correct copy of Resolution  
No. 9264, passed June 15, 1950 on file  
in the office of the City Clerk of the  
City of Glendale.

Dated January 27, 1951

G. E. CHAPMAN,

City Clerk

By (s) J. W. FULLER

Deputy



## EXHIBIT C

Moved by Councilman Burkhard, seconded by Councilman Campbell, that the City Attorney is hereby authorized and directed to file with the Public Utilities Commission on behalf of the City, a petition for an order directing construction of a grade separation at the intersection of Los Feliz Boulevard and the Southern Pacific Company railroad right-of-way and apportioning the costs thereof, and that he is further authorized to take all steps and incur such expense as is necessary to represent the City during all proceedings resulting from the filing of such petition.

Vote as follows:

Ayes: Baird, Burkhard, Campbell

Noes: None

Absent: Wickham, Wright.

I hereby certify that the foregoing is a true and correct copy of motion on file in the office of the City Clerk of the City of Glendale.

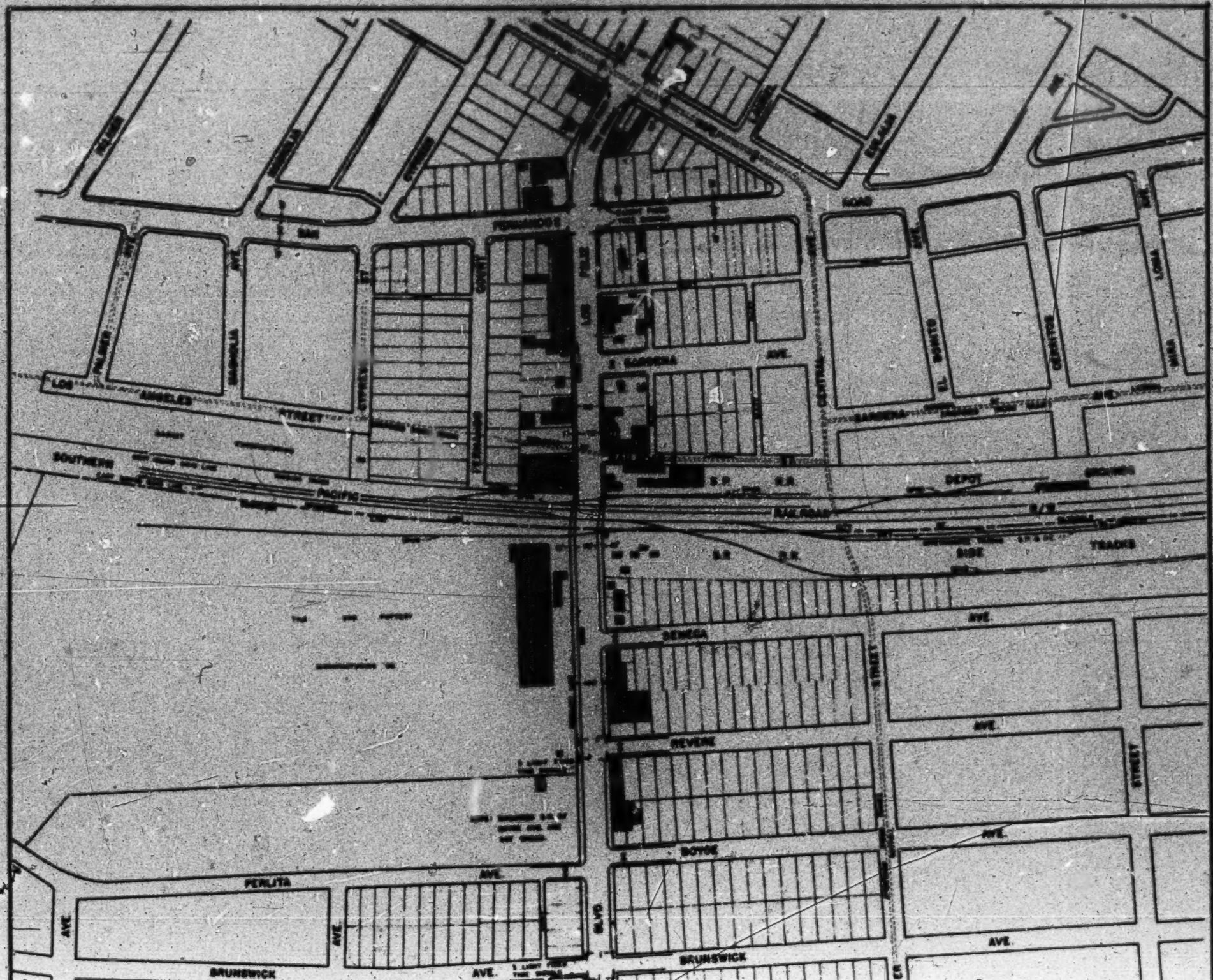
Dated February 23, 1951

G. E. CHAPMAN,

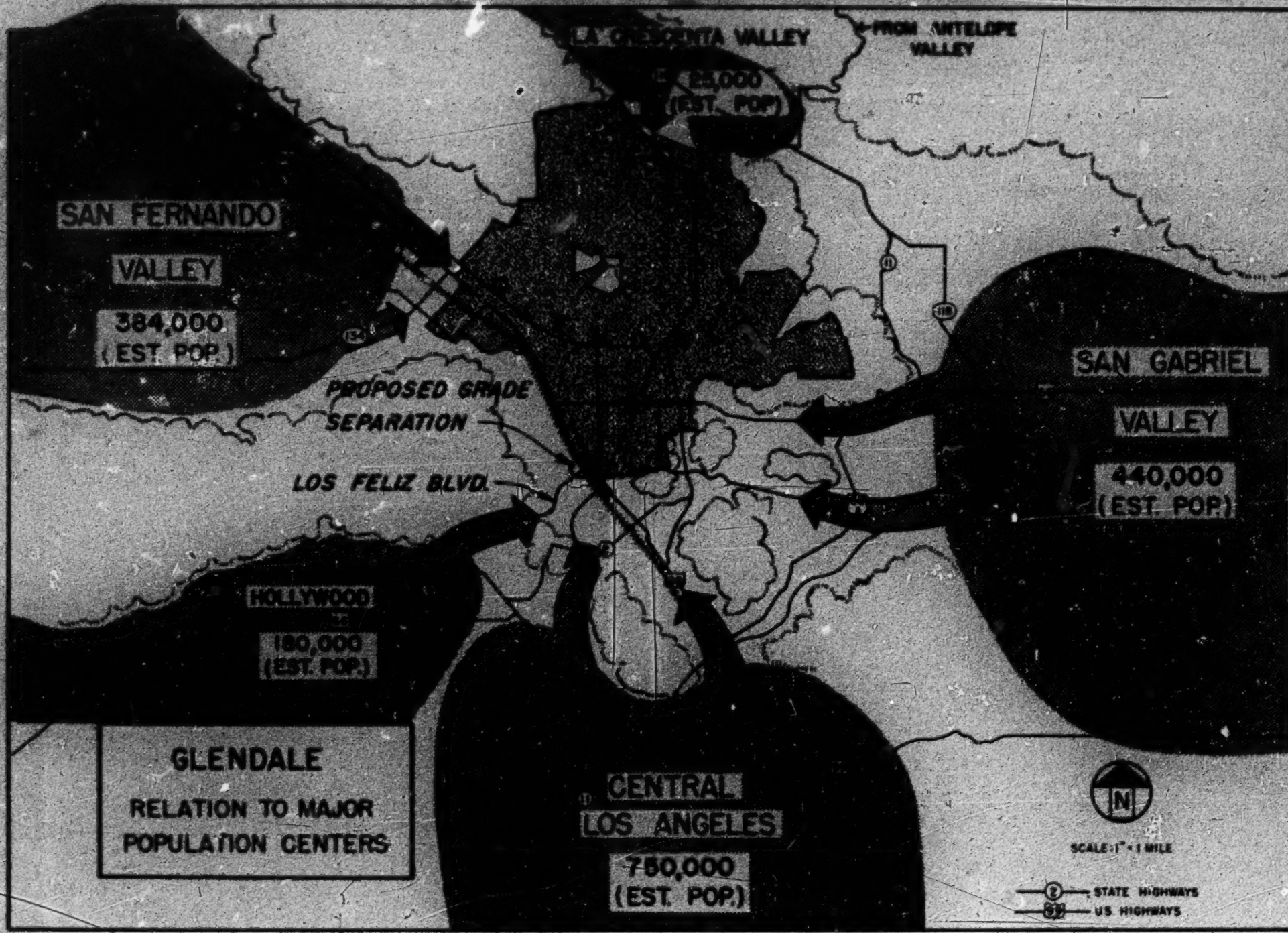
City Clerk

By (s) J. W. FULLER

Deputy







Appendix  
EXHIBIT C



**Exhibit B****Before the Public Utilities Commission  
of the State of California**

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California and the division among the affected parties of the cost incident to such separation.

Case No. 5327

**ORDER INSTITUTING INVESTIGATION**

Good Cause Therefor Appearing,

IT IS HEREBY ORDERED that an investigation be and it is hereby instituted on the Commission's own motion, for the purpose of determining whether, in the interest of public safety, convenience and necessity, the grade crossing of Southern Pacific Company's tracks with Los Feliz Boulevard in the cities of Los Angeles and Glendale (Crossing No. B-476.8) should be abolished through the construction of a grade separation and for the further purpose of determining the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of

and Councilman John C. Holland and Councilman Ernest E. Debs, and Hugo Winter of City Engineer's Office, and Mr. T. M. Chubb, Chief Engineer and General Manager of the Department of Public Utilities and Transportation; *Hodge L. Dolle* for Department of Public Works, and George Langsner, Engineer, John N. McLaurin for the Department of Public Works, and Herbert J. Williams, Department of Public Works; *Robert W. Walker* and *Joseph R. Cummins* for The Atchison, Topeka and Santa Fe Railway Company; *E. E. Bennett* for the Union Pacific Railroad Company; *Sam R. Kennedy*, Road Commissioner, County of Los Angeles, Charles W. Sprutte, Construction Engineer, Road Department of Los Angeles, for the County of Los Angeles; *John P. Commons* for the Regional Planning Commission, Los Angeles County; *H. F. Holley*, Assistant Chief Engineer for the Auto Club of Southern California, for the Los Angeles County Grade Crossing Committee; *H. Allen Smith*, Assemblyman 43rd District, for the City of Glendale as a member of the California State Assembly, and *Fred G. Seig*, Legislative Representative, for the Order of Railway Conductors, interested parties. *Hal F. Wiggins* for the Commission Staff.

### OPINION

This matter concerns an existing grade crossing at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road in Glendale and Los Feliz Boulevard in Los Angeles. The tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-

southeasterly direction, while Los Feliz, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, and one, a yard track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

That portion of the right-of-way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

The legal description of that portion of the grade crossing in Los Angeles is as follows:

A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with the southwesterly [2] line of the Southern Pacific main line right-of-way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the Northwesterly line of said Los Feliz.

Applicant, the City of Glendale, requests an order authorizing and requiring the construction of a grade separation at the above-described crossing and further requests that there be in the order a designation of the portions of the work and construction to be done by Glendale, Los Angeles and the Southern Pacific, respectively, as well as an allocation of the costs thereof.



Subsequent to the filing of the application on May 7, 1951, this Commission on September 25, 1951, issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity", the grade separation should be constructed and also to determine "the proportions in which the expense of constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected . . ."

Public hearings were held in Los Angeles before Commissioner Huls and Examiner Syphers on October 3, November 1 and 29, 1951, during which evidence was adduced, and on the last-named date the matter was submitted with the parties being granted the right to file briefs. Briefs now have been filed and the matter is ready for decision.

At the outset of the hearings the City of Los Angeles[3] introduced into evidence Exhibit No. 1, which is a copy of a resolution of the City Council of Los Angeles, dated October 1, 1951. This resolution adopted a report of a joint committee previously appointed by the council, which report states that since the proposed grade separation lies completely within the City of Glendale and that, therefore, the Public Utilities Commission has no jurisdiction to require the City of Los Angeles to pay any portion of the cost, nevertheless the City of Los Angeles is not opposed to a Commission order which would allocate some costs to the City of Los Angeles subject to the City's agreeing to pay.

The representative of the Department of Public Works of the State of California stated the position of that depart-

ment to be that, since the proposed grade separation would not be of any benefit to a state highway nor benefit the nearest state highway which is approximately 1,000 feet away, the Public Utilities Commission is without jurisdiction to impose any portion of the costs on the Department of Public Works, Division of Highways.

The Chairman of the Board of Supervisors of Los Angeles County, during the course of the hearings, stated that in his opinion the County of Los Angeles would probably contribute to the cost of the proposed grade separation.

As a result of a prehearing conference, at which all of the parties hereto were represented, held prior to the commencement of the formal hearings, a committee was appointed to make a study and prepare an engineering report. This committee, under the chairmanship of the Chief Engineer of this Commission, presented such a report as Exhibit No. 2, various parts thereof [4] being explained by various members of the committee during the course of the hearings.

The Chief Engineer of the Public Utilities Commission, in presenting the first part of this report, outlined the historical background of the matter in question. By Decision No. 17330, dated September 10, 1926, this Commission issued an order directing the elimination of the grade crossings at Los Feliz Boulevard (that here being considered) and also at Brand Boulevard. The decision recommended an underpass be constructed at each location. Subsequently, alleging that finances were not available for such construction, the parties requested dismissal of the proceedings and the matter was dismissed by Decision No. 27098, dated May 28, 1934.

By House Resolution No. 24 of the California Legislature, at its 1949 session, the Commission was directed to initiate proceedings with a view to obtaining grade separations at Los Feliz Boulevard, Glendale Brand Boulevards, and Fletcher Drive. As a result of this resolution the President of the Public Utilities Commission transmitted a report to the Assembly, dated March 6, 1950, setting forth the results of an engineering study showing the estimated costs, economic justification, and problems of financing of the proposed grade separations. Subsequently, the Legislature, by Assembly Concurrent Resolution No. 88 of the 1951 session directed the Commission to hold hearings on the Los Feliz crossing, and the Commission's investigation was instituted accordingly.

A portion of Exhibit No. 2, relating to the importance of the proposed grade separation and its relation to the freeway plan and to major highway arteries, was presented by the Planning Director of the City of Glendale. It was the testimony of this [5] witness that the proposed grade separation is of utmost importance due to the heavy population of the area and to the daily flow of vehicles and trains at that intersection. This grade separation project was number one on the priority list of the Los Angeles County Grade Crossing Committee in 1923, and the ensuing years have not decreased its importance. Los Feliz Boulevard, according to this witness has reached its capacity and at the present time is carrying an overload. This situation has made it urgent to effect the grade separation. Exhibit No. 5 is a map showing the crossing herein considered and the adjoining area.



In connection with this testimony the City Engineer and Street Superintendent of the City of Glendale presented that part of Exhibit No. 2 relating to traffic checks which were made in the area of the present grade crossing. Likewise, this witness presented Exhibit No. 4, which is a more detailed study of these traffic checks. This exhibit shows the number of motor vehicles and the number of pedestrians at the crossing during 24-hour periods on June 17, 18, and 20, 1951, and also shows the delay in vehicles caused by freight trains during these same periods.

The Principal Traffic Engineer of the City of Los Angeles presented testimony relating to the grade crossing and stated that, in his opinion, a grade separation was needed. He pointed out that the stoppage of traffic at the railroad crossing at Los Feliz would cause a "backlash" of traffic which would affect traffic on San Fernando Road. The distance between the railroad crossing and San Fernando Road is approximately 820 feet, which distance is equivalent to a storage capacity of approximately 38 cars in each of the three lanes of traffic. Checks have [6] disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing and, as a result, the "backlash" of these automobiles congests San Fernando Road. Therefore, in the opinion of this witness, a grade separation would not only relieve congestion at this particular crossing but would also relieve congestion on San Fernando Road.

The Assistant District Traffic Engineer of the California Division of Highways likewise presented testimony relating to a traffic count made for four hours during the evening peak on October 15 and four hours during the morning peak

on October 16, 1951. As a result of this check it was the opinion of this witness that train movements across the existing crossing occasionally affect San Fernando Road traffic but are usually minor in effect. He was of the further opinion that the total benefits to Route No. 4 (San Fernando Road) due to the proposed grade separation on Los Feliz Road would be negligible in amount. Exhibit No. 9 is a report of the study made by this witness.

The Street and Parkway Design Engineer of the Bureau of Engineering, City of Los Angeles, presented testimony as to that part of Exhibit No. 2 relating to the estimate of cost. Under the plan proposed, Los Feliz Boulevard is to pass under the Southern Pacific Company's tracks. There will be two 40-foot roadways separated by a median strip with five-foot sidewalks along each side of the boulevard. The structure will be 105 feet wide and the underpass will have 5% and 6% grades on the westerly and easterly approaches, respectively. During the course of [7] construction there will be a full-width detour for traffic.

Three possible methods of handling the storm waters were studied and, in the opinion of this witness, the most desirable would be to construct a storm drain which would be a portion of a permanent drainage system in the area. The other two methods were a gravity storm drain in Los Feliz Boulevard and a storm drain based on a storage basin and limited outflow by pump to Los Feliz Boulevard. Inasmuch as the gravity storm drain was estimated to be the least expensive of the three methods, it was used in the estimate of costs presented. The summarized estimate of cost for the underpass is set out hereinbelow:

Bridge	\$ 403,300
Streetwork (includes excavation, paving, sidewalk, curb, guardrail)	127,100
Outer highway (South side—between Gardens Ave. and Railroad St. in Glendale)	6,600
Proposed Street (between Fernando Ct. and Los Felix Boulevard in Glendale)	11,500
Sanitary sewers	14,500
Storm drains	249,100
Retaining walls	52,000
Detour (Street)	23,800
Railroad shoofly	96,500
Railroad signal work	4,000
Right of way	427,000
<b>Total</b>	<b>\$1,490,300</b>
Engineering and contingencies (15%)	223,500
<b>Grand Total</b>	<b>\$1,713,800</b>

This witness also presented testimony as to the possibility of creating an overpass so that the street would go over the railroad but this method was found to be considerably more expensive than the underpass and accordingly was not recommended.

Exhibit No. 3 consists of photographs, maps, plans and profiles of the proposed grade separation. [8]



A section of Exhibit No. 2, devoted to the economic justification for the proposed separation, was presented by a Supervising Transportation Engineer of the Public Utilities Commission. This portion of the study purported to assign a monetary value to certain benefits which might accrue from the construction of this grade separation. The results of this study are set out hereinbelow:




# LOS FELIZ BLVD.

CENTRAL AVE. TO  
LOS ANGELES RIVER  
(SHOWING S.P. GRADE CROSSING)

PLANNING COMMISSION  
CITY OF GLENDALE

LEGEND

 BUILDINGS  
IN LOS FELIZ IN THE  
VICINITY OF S.P.  
TRAIL

Vehicular delay	\$57,362
Railroad operation cost, gasoline, maintenance	14,053
Accident damages paid by railroad	475
	<hr/>
	\$71,890
Depreciation on railroad portion of structure	6,991
Maintenance on same (Excluding track)	1,620
	<hr/>
	8,611
Net annual savings	<hr/>
	\$63,279
Above savings capitalized at 3%	\$2,109,000
Above savings capitalized at 4%	1,582,000
Above savings capitalized at 5%	1,266,000

It should be noted that a bank official testified that the present cost to Southern Pacific to obtain money on a long-term basis is 5%.

While the foregoing study indicates that the railroad would receive monetary benefits from the construction of the proposed grade separation, this theory was contested by testimony presented by railroad witnesses. The Superintendent of the Los Angeles Division of the Southern Pacific Company testified that the separation of grade at this crossing would be of no benefit to the railroad. He pointed out that the passenger trains using the line do not need to block Los Feliz since they are main line trains and proceed through without any delay. While the passenger [9] trains stop at the Glendale Station, there is ample room for westbound trains without affecting Los Feliz Boulevard, and the eastbound trains can be stopped so as to clear Los Feliz. Freight trains, according to the witness, normally do not stop at the Glendale Station, and he stated there is a company instruction that the maximum number of freight cars on any freight train in the Los Angeles Division be limited to 100 cars. The switching in this area is done during night hours and, according to the testimony of this witness, is of such a small amount that it causes no



serious obstruction to traffic. This witness was of the further opinion that there would be no saving to the company in money paid to employees, for, although a grade separation might save a little time so far as the work of the yard crews is concerned, yet these same crews would be required to be on duty for the same number of hours as at present.

The Road Foreman of Engines of the Los Angeles Division of the Southern Pacific Company described the switching performed in the vicinity of the Los Felix crossing, and corroborated the testimony of the above witness to the effect that a grade separation would be of no benefit to the railroad inasmuch as the switching movements are very short. He likewise corroborated the testimony that the expense to the railroad in the form of employees' wages would not decrease were a separation constructed.

The last portion of Exhibit No. 2, relating to the availability of critical materials, was presented by the Assistant to the Chief Engineer of the Southern Pacific Company. It was his testimony that the possibility of securing steel and other necessary metals and cement for the project was very uncertain. This [10] witness also testified as to the estimated monetary benefits to the railroad through the construction of a separation, and concluded that the net annual benefit would amount to \$5,917. These estimates are set out in Exhibit No. 20, and are listed hereinbelow:

Railroad operation cost (gatemmen, maintenance)	\$14,053	
Accident damages paid by RR	475	\$14,528
Depreciation on RR portion of structure	6,991	
Maintenance of same, excluding track	1,620	8,611
Net annual benefit to railroad		\$ 5,917

It will be noted that the figures of the Assistant Chief Engineer of the Southern Pacific Company are identical



with those of the Supervising Engineer of the Public Utilities Commission except that the former has not included any estimate as to vehicular delay, it being his contention that the elimination of delay to motor vehicles would not be a benefit to the railroad. It was the opinion of this witness that the above estimated annual benefit to the railroad, capitalized at 5%, should constitute the maximum amount which the Southern Pacific Company should be required to contribute to the cost of construction of the proposed overpass. This amount is \$118,340.

This same witness presented testimony as to the drainage problem in the vicinity. It was his opinion that the drainage problem should be solved before any grade separation is contemplated. He pointed out that Exhibit No. 2 estimates the cost of storm drains to be \$249,100. These costs should not be assessed to the structure. This witness further estimated that the storm drains could be constructed for \$28,500 instead of the larger figure [11] shown above. This would reduce the cost of the proposed structure from \$1,713,800 to \$1,460,155. Exhibit No. 21 shows these estimates. It should be noted that the storm drain proposed by this witness would provide drainage for the structure only. His estimate of the cost of this type of storm drain is set out hereinbelow:

Rainfall area 125,630 sq. ft.	
Gallons per minute 1,050	
Pumphouse & storage box	\$15,500
Pumps & electric equipment	10,500
500' 18" RCP—in place—\$5.00 lin. ft.	2,500
Total	\$28,500

Further testimony relating to the drainage problem in this area was presented by an engineer of the Bureau of

Engineering Storm Drain and Design Division of the City of Los Angeles. He presented Exhibits Nos. 22 and 23, drainage maps of the area showing the elevations and the general slope. Concerning the estimate of the Engineer for the Southern Pacific Company as to a proposed drainage system consisting of a sump and pump which would cost approximately \$28,500, this witness contended that that estimate did not include any allowance for maintenance and that, in his opinion, a gravity flow system would be more satisfactory and provide a safer drainage operation. This opinion was corroborated by additional testimony presented by the Street and Parkway Design Engineer of the Bureau of Engineering of the City of Los Angeles.

The railroad presented testimony through its Lease Clerk showing historical data as to the railroad right of way in the area. Exhibit No. 10 shows that the Southern Pacific Company [12] acquired the land in 1873, and Exhibits Nos. 11 to 15, inclusive, relate to various deeds and indentures concerning the property rights of way and easements in the area. Additional testimony in this respect was presented by the Chief Draftsman of the Southern Pacific Company which tended to show that the railroad was established in the area prior to the establishment of Los Feliz. It was stipulated between the parties that the grade crossing was first established some time between 1887 and 1912. Exhibits Nos. 16 to 18 are profile and strip maps of the railroad in that area, while Exhibit No. 19 is a blueprint showing the plan of the Southern Pacific Company's station at Glendale as of May 1951.

After a full consideration of all of the evidence and having the benefit of the briefs filed by the parties in this

matter, we hereby find it to be in the interest of public safety, convenience and necessity and that it would be practicable to require the construction of a grade separation at the intersection of the tracks of the Southern Pacific Company and Los Feliz Road and that the plan prepared by the subcommittee, as presented in Exhibit No. 2 and hereinbefore described, sets out the construction which would be most practicable and would best meet the public safety, convenience and necessity in this matter.

Concerning the allocation of costs of this construction, we find from this record that the proposed construction does not concern a state highway and that, accordingly, the Department of Public Works of the State of California is not directly involved. However, we are cognizant of the positions of the City of Los Angeles and of Los Angeles County, as stated during the course of the hearings. [13]

While the railroad contended that the costs should be assessed according to the so-called "benefits" theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called "benefits" theory, although it is appropriate to observe that the proposed grade separation will obviously be of benefit to the railroad. Both the testimony of the Supervising Transportation Engineer of the Public Utilities Commission and of the Assistant to the Chief Engineer of the Southern Pacific Company, as set



out hereinbefore, show various estimated benefits. The City of Glendale in its brief takes the position that, in the absence of the railroad, the present highway would be adequate and no grade separation would be necessary. Therefore, that City contends that all of the costs should be borne by the railroad. We do not subscribe to this contention, for the evidence shows that the great increase in automotive vehicular traffic is one of the reasons for constructing a grade separation.

According to the evidence the estimated cost of the entire project amounts to \$1,713,800. Of this amount, \$249,100 is for a gravity storm drain extending from a point easterly of the underpass to the Los Angeles River. Another estimate submitted shows that a sump and pump storm drain for the structure alone could be constructed for \$28,500. We are of the opinion [14] and hereby find that, while the more elaborate gravity storm drain is a desirable construction, yet it would provide drainage for more than the structure area. Accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad. Deducting the difference in cost of the storm drains, the allocable cost of the structure is hereby found to be \$1,493,200. This amount of the cost should be allocated amongst the Southern Pacific Company, the Cities of Glendale and Los Angeles and the County of Los Angeles. In making an allocation of these costs we have in mind the contention of the City of Los Angeles on brief that the proposed grade separation would be entirely within the City of Glendale and that that City, therefore, should bear the larger allocation so far as the municipal entities are concerned. Nevertheless, the evidence in this case shows

that the westerly approach to the underpass will be in the City of Los Angeles and further that all of the traffic using this underpass either goes to or from the City of Los Angeles. In addition, one of the spur tracks which is directly involved is now within the City of Los Angeles. We likewise have in mind the position of the Chairman of the Board of Supervisors of the County of Los Angeles to the effect that the County would probably contribute to the cost. Therefore, in view of all of the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable cost of \$1,493,200, the Southern Pacific Company should bear 50 per cent, or \$746,600, the County of Los Angeles 25 per cent, or \$373,300, and the Cities of Glendale and Los Angeles  $12\frac{1}{2}$  per cent each, or \$186,650 apiece. [15]

### ORDER

Application as above entitled having been filed, public hearings having been held thereon, and the Commission being fully advised in the premises,

IT IS ORDERED that the City of Glendale be authorized and it hereby is directed to separate the grades of Los Feliz Road and the tracks of the Southern Pacific Company in the manner and at the location more particularly described in the foregoing opinion and substantially in accordance with the plan introduced in this proceeding, subject to the following conditions:

1. Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be \$1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent

(25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles.

2. Upon completion of the construction of said grade separation, the cost of maintaining those portions of the separation, which for the purpose of this decision shall be referred to as the superstructure and be deemed to be everything above the bridge seats, shall be borne by the Southern Pacific Company. The remainder of the maintenance of the grade separation structure shall be borne by applicant.

3. The City of Glendale shall prepare detail plans and specifications for the construction of the grade separation, as referred to above, to carry Los Feliz Road under the tracks of Southern Pacific Company in the City of Glendale, the City of Glendale to submit said plans and specifications to the other interested parties and to the Commission for its approval within one hundred and twenty (120) days from the date hereof. Should they fail to agree on the plans, such disagreement shall be reported to the Commission, whereupon an appropriate order will be entered.

4. The City of Glendale shall undertake the construction of the separation referred to herein and upon receiving the approval of the Commission of the plans to be submitted, shall begin construction of the separation and shall be responsible for its completion. [16]

5. Upon completion of the various phases of this project as the monies become payable and upon the presentation of proper bills therefor, the County of Los Angeles, the City of Los Angeles, and the South-



ern Pacific Company shall pay to the City of Glendale the costs apportioned to said agencies by this order.

6. The grade separation structure shall be constructed with clearances conforming to the provisions of General Order No. 26-D of this Commission.

7. The construction herein ordered shall be commenced within one year and completed within two years after the date hereof, unless further time is granted by subsequent order.

8. Within thirty (30) days thereafter, applicant shall notify this Commission in writing of the completion of the construction of said grade separation and of its compliance with the conditions hereof.

The effective date of this order shall be twenty (20) days after the date hereof.

Dated at San Francisco, California, this 30th day of June, 1952.

R. E. MITTELSTAEDT

*President*

HAROLD P. HULS

KENNETH POTTER

PETER E. MITCHELL

*Commissioners*

Certified as a True Copy

[Seal] NOEL COLEMAN

*Asst. Secretary,*

*Public Utilities Commission*

*State of California [17]*

Commissioner Justus F. Craemer, being necessarily absent, did not participate in the disposition of this proceeding.

**Exhibit D****Before the Public Utilities Commission  
of the State of California**

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

Application  
No. 32385

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.

Case  
No. 5327

**APPLICATION OF SOUTHERN PACIFIC COMPANY  
FOR REHEARING**

*To the Honorable, The Public Utilities Commission of the  
State of California:*

Southern Pacific Company, a corporation, respectfully applies for a rehearing in the above entitled proceedings,

and asks that Decision No. 47420 rendered therein under date of June 30, 1952 be set aside and annulled.

Southern Pacific Company represents that said decision is unlawful in that the Public Utilities Commission has not regularly pursued its authority, has acted beyond and in excess of its jurisdiction, and has violated rights of Southern Pacific Company under [1] the Constitution of the United States, and of this State, as follows:

## PART ONE

### I

That in its decision and order the Commission failed to find upon the material facts at issue, although undisputed evidence was submitted to the Commission at the hearing of said application and case.

### II

That the findings of the Commission, and its order set forth in said decision and order are not supported by undisputed evidence submitted to the Commission.

### III

That said decision and order is not supported by the evidence, but is contrary thereto, and the findings and conclusions of the Commission, upon which said decision and order is predicated, are, therefore, without foundation, contrary to law and void.

### IV

That said decision and order made by the Commission cannot be based upon facts found by the Commission.



## V

That in said decision and order the Commission exceeded its jurisdiction in allocating 50% of the allocable costs to Southern Pacific Company, and the said decision and order of the Commission imposing upon Southern Pacific Company one half or 50% of the allocable cost of the underpass was arbitrary and unreasonable and a void exercise of the police power.

## VI

That said decision and order, if permitted to become effective, will confiscate Southern Pacific Company's property and deprive it of its property, without due process of law, and deny Southern [2] Pacific Company the usual protection of the law, contrary to the provisions of the 14th Amendment to the Constitution of the United States, and contrary to the provisions of the Constitution of the State of California.

## VII

The decision and order of the Commission is so arbitrary as to violate the due process clause of the 14th Amendment of the Federal Constitution, and Article 1, Section 13 of the California Constitution, and also unduly burdens Interstate Commerce in violation of the commerce clause of the Federal Constitution.

## VIII

The decision and order of the Commission is invalid because it violates such requirements as that of Article 1, Section 14 of the California Constitution, which prohibits the taking of property for public use without due compensation.

## IX

The decision and order of the Commission, in apportioning costs to the Southern Pacific Company in the amount of 50% of \$1,493,200., has placed an undue burden on Interstate Commerce, in violation of the commerce clause of the Federal Constitution, and violates the policy in favor of economical railroad operation set forth as the National Transportation Policy (54 Statutes at Large, 899).

## X

The Commission has acted so arbitrarily and unreasonably in apportioning costs to the Southern Pacific Company at 50% of the estimated allocable costs of \$1,493,200 so as to deprive Southern Pacific Company of the equal protection of the law and of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution, and Article 1, Sections 13 and 14 of the California Constitution. [3]

## XI

The Commission's action in connection with the apportionment of costs of the proposed grade separation is arbitrary because it is not based upon any evidence in the record, and the Southern Pacific Company has been denied a fair hearing, all in violation of the substantive or procedural due process of law required by the 14th Amendment to the Federal Constitution and by Article 1, Section 13 of the California Constitution.

## XII

That if said decision and order becomes effective and final, Southern Pacific Company will suffer detrimental and irreparable damage and great financial loss.

**NOTE:** The term "Los Feliz Road" and "Los Feliz Boulevard" relates to the same crossing and has been used interchangeably by the Public Utilities Commission. In the heading of Application 32385 the Commission has used "Los Feliz Road" while in Case No. 5327 the Commission has used "Los Feliz Boulevard." These references refer to the same highway and have been so treated by all the parties. [4]

## PART TWO

### XIII

#### **A Rehearing Should Be Granted Pending the Determination of Important Questions of Law**

The Los Feliz matter in Glendale (Application 32385 and Case 5327) arose after the filing and first hearing of the so-called Washington Boulevard matter in the City of Los Angeles, Application No. 29396, which, on June 24, 1952, resulted in Decision No. 47344. The Washington Boulevard case has been recognized as a test case in these matters.

The parties in the Washington Boulevard matter have until 30 days after June 24, 1952, or July 26, 1952, within which to apply to the Supreme Court of California for a writ of certiorari or review (Section 1756 of the Public Utilities Code). Since the decision in the Los Feliz Boulevard matter was based on and specifically followed the Washington Boulevard decision in rejecting the "benefit" theory (Opinion page 14, lines 1-11), it appears that the present Los Feliz Boulevard decision No. 47420 in Application No. 32385 and Case No. 5327 should be annulled and set aside until there is a final judgment after review of the courts in the Washington Boulevard Application No. 29396, Decision No. 47344.



This application for rehearing in this, the Los Feliz Boulevard case in Glendale will be on file before any application to the California Supreme Court for a writ of certiorari or review will be filed in the Washington Boulevard Application No. 29396, Decision No. 47344 because of the difference of time elements in the statutes. However, by the time this application for a rehearing is decided, it is expected there will be on file in the California Supreme Court an application for a writ of certiorari or review in the Washington Boulevard case. Until that matter is decided by the courts, including the applicability of the "benefit" theory of apportioning [5] costs, it appears the Southern Pacific Company should protect its record, and in the event this application for a rehearing is denied it further appears it will be necessary to file a similar application for a writ of certiorari or review.

It is submitted that if the Commission believes it should deny this application for rehearing on all other grounds, still the Commission should grant a rehearing and defer further action until such time as the Washington Boulevard Application No. 29396, Decision No. 47344 is reviewed by the courts and becomes final. Otherwise, the only safe alternative for Southern Pacific Company is to proceed as provided in Section 1756 of the Public Utilities Code and take what steps that can be taken to prevent this Los Feliz Boulevard Decision No. 47420 from becoming final until the courts have reached a final conclusion on the Washington Boulevard Decision No. 47344. It does not seem proper that the parties be put to the expense and labor that will result if an application for rehearing is denied in this matter.

## XIV

**The Commission Has Incorrectly Stated  
Facts in Its Decision**

A. On page 2 of the Opinion there appears the following language:

"The boundary line between the two cities (Glendale and Los Angeles) parallels the tracks in the area of the intersection." (Opinion, page 2, lines 15-16)

while the evidence showed the boundary line to be on the west side of the right of way of the Southern Pacific Company (Maps attached to Exhibit 3). The above quoted language should be compared to the language on page 15, lines 9-18 of the Opinion. The above quoted language should be corrected in order to state the true facts in view of the position taken by the City of Los Angeles. (Exhibit 1 and Opinion, page 3, last line to page 4, line 11). [6]

B. On page 2 of the Opinion there appears the following language:

"Four of the above mentioned tracks are in Glendale, and one, a *yard track*, is in Los Angeles." (Italics added).

while on page 16, there appears the following language:

"In addition, one of the *spur* tracks which is directly involved is now within the City of Los Angeles." (Italics added).

It is believed both transcript references refer to the same track since there appears to be only one track in the City of Los Angeles. The Commission should use the same identifying language, or confusion will result. Usually a yard track

is within a railroad right of way, while a spur track is outside of the right of way. In view of the fact the boundary of the Cities of Glendale and Los Angeles is found on the west side of the railroad right of way, and the fact the City of Los Angeles took the position the railroad tracks were not located within the City of Los Angeles, (Opinion page 4, lines 1-11 and page 15, lines 9-18) this use of terminology becomes very important. The Southern Pacific Company desires an accurate and adequate record. It is submitted the above use of yard track should be corrected to spur track or the Commission point out with certainty wherein the two tracks are different as well as the location of each. (See also Rep. Tr. p. 409-410 and p. 418, l. 6-11). It is submitted the track in the City of Los Angeles was the spur track of Gladding-McBean Company (Rep. Tr. p. 245, l. 16-21) and should be properly named. (See also Exhibit 19).

C. On page 13, lines 3-7 of the Opinion there appears the following:

"Additional testimony in this report was presented by the Chief Draftsman of the Southern Pacific Company which tended to show that the railroad was established in the area prior to the establishment of Los Feliz."

It is believed this statement should be corrected to show that construction of the railroad started in 1873 and the first train was operated across the site of the present Los Feliz Boulevard on April 20, 1874. (Rep. Tr. page 237, line 15 to page 238, line 21—See also Exhibit 16 that shows the railroad profile with railroad track in place in 1876.)



This matter is of particular importance in the theory of prior user or first user and the allocation of costs based upon that theory. Further it should be noted the applicant, City of Glendale, in its opening Brief on page 3, lines 14-15, stated:

"The Southern Pacific main line tracks in the vicinity of Los Feliz were constructed prior to 1876."

D. There is an erroneous computation on page 15, lines 24-6 of the Opinion. The Opinion reads:

"We hereby find that, of the allowable cost of \$1,493,200, the Southern Pacific Company should bear 50 per cent, or \$746,600 \* \* \*."

In computing 50% of \$1,493,200. the result is \$746,600. Further if the amounts as set forth in the Opinion (page 15, lines 25-8) are added together, the total is \$600 short of the overall figure of \$1,493,200.

## XV

**The Commission Has Failed to Find Upon Material Facts at Issue Although Undisputed Evidence Was Submitted to the Commission.**

The Commission's method of reciting and summarizing evidence of a particular witness leaves the record in a confused state when one attempts to ascertain just what the Commission found in the way of facts and ultimate facts.

There is little statutory direction upon this subject. Section 1705 of the Public Utilities Code provides: [8]

"After the conclusion of the hearing, the Commission shall make and file its order, containing its decision."

Section 1757 of the Public Utilities Code provides in part:

"The findings and conclusions of the Commission on questions of fact shall be final . . . *Such questions of fact shall include ultimate facts . . .*" (Italics added.)

Thus by direction of statute it appears the legislature requires the Commission to decide upon not only ultimate facts but all questions of fact. (See also *Southern Pacific Co. vs. Railroad Commission* (1939) 13 Cal. (2) 125, 129 and cases cited therein.)

The necessity for findings by an administrative agency may rest upon constitutional grounds (*Wichita R. & L. Co. v. Public Utilities Comm.*, 260 U.S. 48 (43 S.Ct. 51, 67 L. Ed. 124); *Mahler v. Eby*, 264 U.S. 32 (44 S.Ct. 283, 68 L. Ed. 549)), or, as here, upon a statutory requirement. The basic purposes of findings are to aid the court in determining whether there is sufficient evidence to support them (*Atchison, T. & S. F. Ry. Co. v. Commerce Comm.*, 335 Ill. 624 (167 N.E. 831)); to enable the court to examine the decision of the administrative agency in order to determine whether it is based upon a proper principle (*United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499 (55 S.Ct. 462, 79 L. Ed. 1023)); and to apprise the litigants or parties in regard to the reason for the administrative action as an aid to them in deciding whether additional proceedings should be initiated and, if so, upon what grounds (*Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U.S. 74, 86 (51 S.Ct. 1, 75 L. Ed. 221)). Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings (*Meeker & Co. v. Lehigh Valley R. Co.*, 236

U.S. 412 (35 S.Ct. 323, 59 L. Ed. 644); *Cantrell v. Board of Supervisors*, 87 Cal. App. 2d 471 (197 P.2d 218)).

The Opinion of the Commission, commencing at the bottom paragraph of page 5 and extending to the top of page 13, recites and [9] summarizes evidence of various witnesses. It cannot be determined whether the evidence of these witnesses as summarized was approved or rejected by the Commission. This summarizing of witnesses' evidence is interesting reading but it cannot be ascertained from either the Opinion, the decision or the order if the Commission found the recited facts to be true or false.

Further, when the Commission used the phrase on page 13, line 13, as follows:

"After a full consideration of all the evidence."

was the Commission referring only to the evidence of witnesses summarized in the Opinion, or that evidence presented in the application and case?

It is submitted the parties in this matter are entitled to know in the decision and order the facts found by the Commission as well as ultimate facts. The recital method of summarizing evidence of various witnesses is not a compliance with the statute, is arbitrary, unreasonable and void. This method of summarizing the evidence of various witnesses leaves the record with nothing in it as far as a finding of fact or ultimate fact. The statute provides a method and a procedure for decisions and orders and it is submitted the Commission should follow the statutes and cases upon the subject (*Southern Pacific Co. vs. Railroad Commission* (1939) 13 Cal.(2) 125). To not do so is arbitrary, unreasonable and discriminatory. It is further submitted the Commission is rendering such a decision as is in



question here has not, "regularly pursued its authority" (Public Utilities Code, Section 1757).

The state of the decision and order is such that there are no findings of fact or ultimate fact as required by Section 1757 of the Public Utilities Code. Although the evidence was uncontradicted that there is a delay to vehicular traffic in Los Feliz Boulevard, [10] and that the separation of grades should eliminate such delay, there is no finding of fact or ultimate fact upon the subject. The same situation prevails as far as accident hazard is concerned where the crossing equipped with crossing gates had a successful record as far as accidents are concerned (Rep. Tr. p. 338, l. 8-10 and Exhibits 2 and 20), and yet there is no finding of fact or ultimate fact upon the subject. The net result of an examination of the Opinion, decision and order is that there are no findings on both questions of facts and ultimate facts.

Neither the decision nor opinion find as a matter of fact or ultimate fact that Los Feliz Boulevard is a road of considerable importance (Rep. Tr. p. 20, line 2) leading principally to many population centers in Southern California; that Los Feliz Boulevard is a major traffic artery and is a place where traffic of major importance to the metropolitan area will flow in increasing volume (Rep. Tr. p. 23, lines 19-20); that traffic from Antelope Valley to the Los Angeles Harbor (Rep. Tr. p. 26, lines 20-22) from the desert, beach and mountain areas (Rep. Tr. p. 29) use Los Feliz Boulevard in large numbers, that travel to and from the interior valley use Los Feliz Boulevard (Rep. Tr. p. 30), that Los Feliz Boulevard is a very important segment of the Master Highway Plan (Rep. Tr. p. 27, lines 2-3) that Los Feliz Boulevard is an important road (Exhibit 2 and

Rep. Tr. p. 185, lines 12-26 and p. 195, lines 5-6), although the evidence was uncontradicted upon the subject. Further, neither the decision nor Opinion find that state gas tax funds will be used to finance the project.

Neither the Opinion nor decision find that the railroad has ceased to be the prime instrument of danger and the main cause of accident, although the evidence was uncontradicted.

Neither the Opinion nor decision find that the growth of the community in which the grade separation was proposed was not [11] mainly the result of the transportation facilities offered through the railroad.

Likewise, neither the Opinion nor decision find that the separation of the grade crossing was not a normal incident to the growth of rail operation.

Further, neither the Opinion nor the decision find that the community's growth and highway improvement would not benefit the railroad.

In addition, the Commission in its decision and Opinion failed to find that the highways are not feeders of rail traffic, and that the avoidance (by grade separation) of traffic interruptions incident to a crossing at grade is now of far greater importance to the highway users than it is to the railroad.

The above omissions of findings of fact and ultimate fact on uncontradicted evidence results in a conclusion that the Commission has acted arbitrarily, and that Southern Pacific Company has been denied a fair hearing, all in violation of the substantive or procedural due process of law required by the 14th Amendment to the Federal Constitution and by Article 1, Section 13 of the California Constitution.

**The Findings of the Commission Are Not Supported  
by Undisputed Evidence**

The findings of the Commission are found in a one sentence paragraph (on page 13, lines 13-22). The material portion of the findings are:

"We hereby find it to be in the interest of *public safety*, convenience and necessity and that it would be practicable to require the construction of a grade separation." (Italics added.) (Opinion, page 13, lines 15-17.)

The evidence summarized in the Opinion does not relate to public safety. Public safety was not an issue developed before the Com- [12] mission. What was before the Commission was the elimination of vehicular delay. A portion of the evidence of the Planning Director of Glendale was summarized in the Opinion at pages 5 and 6. The following uncontradicted evidence should have been added that supported the application:

"that the substantial delay, inconvenience and losses of time and money be eliminated." (Rep. Tr. p. 21, lines 20-22.)

The controlling motivation for a grade separation was well set forth in a question asked by the Assistant City Attorney of Glendale, the applicant, of the Principal Traffic Engineer of the City of Los Angeles as follows:

"Q. In other words, the benefits to Glendale of a grade separation would be the elimination of the blocking at San Fernando Road; that is the principal additional benefits you think Glendale gets from the grade separation? A. Yes, and I think the State gets it



because of the increased volume of traffic that they are able to move on San Fernando Road." (Rep. Tr. p. 191, lines 14-19.)

There was no safety problem at Los Feliz Road because of the crossing gates installed at the railroad tracks. (Rep. Tr. p. 248, l. 25 to p. 250, l. 2.)

The finding of "public safety" is entirely unsupported by the record and the evidence. What the evidence supported was elimination of numerous delays to vehicles while the trains crossed Los Feliz Boulevard (Exhibit No. 2). This vehicular delay does not support any finding of public safety.

The very facts of the extended proof in this matter on vehicular delay was recognized in the case of *Nashville C. & St. L. R. Co. vs. Walters* (1934) 294 U.S. 405, 79 L. Ed 949, 959 wherein the court said:

"The main purpose of grade separations therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles." (Italics added.) [18]

Thus for the Commission to make a finding of public safety which was not supported by the evidence or the law is arbitrary, unreasonable and without authority of law.

It is to be remembered that although Section 1757 of the Public Utilities Code provides:

"The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this article."

That Section 1760 of the Public Utilities Code provides:

"... the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the Commission material to the deter-

mination of the constitutional question shall not be final."

There must be subordinate findings supported by the evidence to support the ultimate finding of the Commission.

In *Southern Pacific Company vs. R. R. Comm.* (1939) 13 Cal.(2d) 125, it was pointed out that the statutory requirements as to "findings" to be made by the Commission are practically identical with those contained in the Workmen's Compensation Act, and that findings made without evidence will be annulled.

It is submitted the Commission should properly find upon the evidence (see Exhibit 2) that there was not public safety involved in the matter before the Commission. The Commission's finding was not supported by the evidence, and the evidence was entirely to the contrary. Therefore, the finding of the Commission is void and null, and the Southern Pacific Company was not accorded a fair hearing in that the due process clause was violated.

There is a further matter of the fact that materials will be unavailable during the time the construction work must be completed. See paragraph XIX entitled "The Commission's order has failed to consider the evidence relating to the steel and copper restrictions with the result the order requires impossibilities." [14]

## XVII

**The Commission Unlawfully and Improperly Exercised the Police Power Under the Particular Facts in This Matter**

A. Los Feliz Boulevard crossing of the Southern Pacific tracks is a place where crossing gates have been maintained for many years. There were no operating benefits

to the railroad other than shown on Exhibit 20 (see also summary of evidence of Assistant to Chief Engineer of Southern Pacific Company, Opinion page 1, lines 1-25), and the total amount of benefit that accrued to the Southern Pacific Company was \$118,340.00. This total should be compared to that allocation of cost determined by the Commission, of \$746,000.00 (although that figure was given by the Commission, there appears to be an error of \$600.00 in the computation).

How can this difference be explained? The Commission states it will not follow the "benefit" theory but will rely upon the police power (Opinion page 14, lines 1-11). There is no tangible evidence to support the Commission's decision to assess the railroad 50%, nor does the Commission state in its decision how it reached the 50% proportion. Likewise, the Commission has not explained how it reached a 50% proportion in applying Section 1202 (c) of the Public Utilities Code.

The Commission in its opinion in the Los Feliz Boulevard Application No. 32385, Case 5327 and Decision No. 47420 stated in the Opinion on page 14, lines 1-8 as follows:

"While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory, although it is appropriate to observe



that the proposed grade separation will [15] obviously be of benefit to the railroad."

Further, in the Washington Boulevard Application No. 29396, Decision No. 47344, the Commission in that Opinion on page 16, lines 10-23 said the following:

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Eric Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U.S. 394; 55 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U.S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 236 U.S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U.S. 24; 73 L. ed. 161)."

and on the next pages (page 17, line 26 to page 18, line 6) the Commission said the following:

"In the instant case, the proposed widening of Washington Boulevard is to meet local transportation needs, and the City's contribution thereto must come entirely from local funds.

"In Decision No. 43374, supra, we said 'the railroad has a continuing obligation to participate in the cost of such an improvement as is contemplated'. While we hold that the allocation of costs herein is an exercise

of the police power, and that we are not bound to follow the benefit theory, we observe that this proposed improvement is not without benefits to the railroad."

The above statement in the Washington Boulevard Application No. 29396, Decision No. 47344 that the widening was to meet local transportation needs should be compared to uncontradicted evidence in the Los Feliz Boulevard Application No. 32385, Case No. 5327, Decision No. 47420 that Los Feliz Boulevard was a road of considerable importance (Rep. Tr. p. 30, line 2) leading principally to many population centers in Southern California, that Los Feliz [16] Boulevard is a major traffic artery and is a place where traffic of major importance to the metropolitan area will flow in increasing volume (Rep. Tr. p. 23, lines 19-20), that traffic from Antelope Valley to the Los Angeles Harbor (Rep. Tr. p. 26, lines 20-22) from the desert, beach and mountain area (Rep. Tr. p. 29) use Los Feliz Boulevard in large numbers, that travel to and from the interior valleys use Los Feliz Boulevard (Rep. Tr. p. 30), that Los Feliz Boulevard is a very important segment of the Master Highway Plan (Rep. Tr. p. 27, lines 2-3) and that the proposed separation of Los Feliz Boulevard is not to meet local transportation needs (Exhibit 2 and Rep. Tr. p. 185, lines 12-26).

The above facts of the Los Feliz Boulevard matter fit squarely within the latest case in the Supreme Court of the United States of *Nashville, C. St. L. R. Co. vs. Walters* (1935) 294 U.S. 405, 79 L. Ed. 949, 956, 959-60.

B. The Commission has overlooked in both the Los Feliz Boulevard Decision 47420 and Washington Boulevard

Decision 4344 the means of municipal financing. Cities and counties have available and use the so-called state gas tax funds to finance these projects. (See Exhibits 1, 6 and 7, Article XXVI of the Constitution and Statutes passed pursuant thereto). The testimony of Mr. Jessup, the Chairman of the Board of Supervisors of Los Angeles County stated as follows:

"I do feel that we could contribute a substantial amount, due to the fact that we gave to the Cities of Los Angeles County outside of this gasoline tax money, outside of the moneys given, based on a formula, which is each and every year, we gave them, last year, an extra \$1,750,000 or \$1,700,000 dollars. That was above that system, the money that we had given based on a formula basis. From that amount I would say that the Board would give quite a substantial amount towards this cost.

"Q. How is that programmed each year? Do you make a budget?

"A. Yes. [17]

"Q. And you spell out how the money shall be spent?

"A. That is right. We spell out to this extent, that we gave to the cities last year the moneys from the gasoline tax, their share, at least, I would say on this Formula 316, and then we had over that amount, we had \$1,750,000. That, of course, we just gave them, and although we did earmark moneys to be spent in certain projects, not very much, but some.

"Q. Does the Board have that authority to assign this money, this gasoline money? A. Above that three-sixteenths. Well, we really have all of it. We have the authority to do all of it, but we do have a general agreement that we contribute a certain amount unear-



marked, leave that up to the various cities." (Rep. Tr. 224, 1. 22 to p. 225, 1. 22.)

C. The Southern Pacific Company urges the Commission to consider the language in the most recent case in the Supreme Court of the United States upon the subject of allocation of seats on grade separations. This case of *Nashville v. N. E. R. Co. ex. Watters* (1905) 204 U.S. 405, 79 L. Ed. 345, 354, 355-56 was not discussed in the decision and order which although reference was made to the Washington Boulevard Application No. 22202 Decision No. 47344 which on this page 12 thereof discussed that case.

The Commission's attention is directed to the fact that the California case of police power decided before the *Nashville* case (supra) recognized that a change in the handling of the allocation of seats could come in the future by using language that laid down the exercise of police power to public safety, and also language that recognized the "benefit" theory.

In *City of San Jose vs. Railroad Commissioners* (1917) 175 Cal. 294, 295, 296, the Court in a grade separation case involving the Southern Pacific Company in San Jose at "The Alameda" said:

"The right of apportionment of the cost by the Commission to the parties benefited by the crossing is a proper element of this cognate power" (of the Commission).

Then the court went on to cite with approval a Milwaukee case [18] as follows:

"The growth of the city and of the railroads has been coincident, interdependent, inseparable, and from this growth has arisen the great danger of grade crossing.

Why should not the expense of removing that danger be equitably shared by the different agencies whose joint growth has brought it about."

The above language showed great danger of grade crossing and benefits. This is exactly the same situation that prevailed in the United States as a whole in the period around 1877 and was recognized in the cases cited by the Commission in the Washington Boulevard Application No. 23002, Decision 17344 (page 16). The *Riva* case cited there was decided in 1914, the *Minneapolis* case was decided in 1914, the *Owaka* case was decided in 1914 and the *Ledigh Valley* case was decided in 1922.

It was the *Nashville* case (234 U.S. 405, 70 L. Ed. 949, 230, 300-50), decided in 1933 by the Supreme Court, wherein the Court pointed out that the old basis for assessing and proportioning costs was no longer the law and said:

"The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use of highways; the change in the consensus for elimination of grade crossings, in the purpose of such elimination, and in the chief beneficiaries thereof; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents."

and held:

"The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid move-

ment by action which in this respect grade separation is a desirable engineering feature comparable to removal of grades and curves, to widening the highway, to strengthening and straightening it, to shortening distances, to bettering up good roads, and to bridging streams. The railroad has aimed to be the prime instrument of change and the able cause of accidents. It is the railroad which now requires protection from danger incident to motor transport. [19] Action. Prior to the establishment of the Federal-aid system, Tennessee highways were built under the direction of the commissioners, and paid for out of funds raised locally by taxation or otherwise. They served, in the main, local traffic. The long distance traffic was carried almost wholly by the railroads and the water lines. Under these conditions the advance for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then, it was reasonable to impose upon the railroad a large part of the cost of eliminating grade crossings; and the imposition was surely a hardship. For the need for eliminating existing crossings, and the need of new highways from fresh grade crossings, arose usually from the growth of the community in which the grade separation was made; this growth was usually the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident of the growth of rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing Federal-aid highways, like that here in question, is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues



of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad owners. For the rail operations are few; those of motor vehicles very numerous."

For those who were studying the effect of the change of economic relations upon grade separations, the above case was not a surprise. In *Southern R. Co. v. Virginia ex. rel. Shirley* (1923), 260 U.S. 130, 78 L. Ed. 260, the State Highway Commissioner was given statutory authority to order a separation of grades at the expense of the railroad without notice. The court said:

"Certainly, to require abolition of an established grade crossing and the outlay of money necessary to construct an overhead would take the railway's property in a very real sense. This seems plain enough both upon reason and authority. *Washington Ex Rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U.S. 510, 523, 524, 56 L. ed. 932, 933, 22 S.Ct. 535; *Great Northern R. Co. v. Minnesota*, 228 U.S. 340, 245, 59 L. ed. 1337, 1339, 25 S.Ct. 753, P.U.R. 1915 D, 701. See *Chicago, M. & St. P. R. Co. v. Railroad Comrs.* 76 Mont. 306, 247 Pac. 162 [20].

"If we assume that by proper legislation a State may impose upon railways the duty of eliminating grade crossings, when deemed necessary for public safety and convenience, the question here is whether the challenged statute meets the requirements of due process of law. . .

"Counsel submit that the Legislature, without giving notice or opportunity to be heard, by direct order

might have required elimination of the crossing. Consequently, they conclude the same end may be accomplished in any manner which it deems advisable without violating the Federal Constitution. But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

Thus the situation before the Commission is that the Commission must apportion the cost "to the parties benefited". The Commission cannot act arbitrarily. The Commission must also recognize that in the matter of Los Felix Boulevard there was not great danger in the grade crossing, but the motivating factor was elimination of vehicular delay. Thus the application of the apportionment of benefits to the parties should be consistent with the motivation, or the benefit created by vehicular delay. Further, the elements approved by the case of *San Jose vs. Railroad Commissioners* (1917) 175 Cal. 284, 288-90 do not appear in the Los Felix case, but the facts as stressed by the *Nashville, etc. v. Walters* (294 U.S. 405, 79 L. Ed. 949, 956, 959-60) are those present in the Los Felix case, and it is submitted the Commission should follow the doctrine of the *Nashville, etc. vs. Walters* (*supra*) case. [21]

## XVIII

**The Commission's Authority to Arbitrarily Apportion Costs on a 50% Basis**

The Commission recognizes that its authority to apportion costs is found in Section 1202 of the Public Utilities Code (Opinion p. 14, lines 2-8). Certain language in that Section should be closely examined. Section 1202 (c) provides:

"The Commission has the exclusive power: (c) . . . to prescribe the terms upon which such separation shall be made and the proportions in which the expense . . . shall be divided. . . between such (railroad) corporations and the state, county, city, or other political subdivision affected."

Can the Commission arbitrarily apportion the expense? Can the Commission arbitrarily apportion the cost 50% on the railroad and 50% on the municipal corporations? What yardstick shall be used? It is elementary that the Commission cannot act arbitrarily.

The Commission touched on the "benefits" theory as follows:

"While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 37344, dated June 24, 1952, on Application No. 29396, wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore we are not bound to follow the so-called 'benefits' theory. . ." (Opinion p. 14, lines 1-9)



and then went on to find in the decision:

"Therefore, in view of all the evidence in this case and considering the positions of the respective parties hereto, we hereby find that, of the allocable costs. . . Southern Pacific Company should bear 50 per cent . . . the County of Los Angeles 35 per cent . . . and the Cities of Glendale and Los Angeles 12½ per cent each . . ."

Obviously the Commission was using no yardstick. There was nothing in the evidence to support such a finding except a statement about police power. How can the Commission reach such a percentage? [22] The purpose of the proposed separation of Los Feliz Road is not to increase public safety, but to increase the free flow of vehicular traffic on a road of considerable importance leading principally to the many population centers in Southern California (Rep. Tr. p. 20, l. 2, page 23, lines 19-20, page 26, lines 20-22, page 29, page 27, lines 2-3, page 185, l. 12-28, page 19, l. 5-6, page 29).

Since the submission of these matters and the filing of the briefs there was published (under date of May 1, 1952) a very comprehensive and extensive report and publication of the Stanford Research Institute entitled, "The Railway-Highway Grade Crossing Problem—Economic Principles." The purpose behind this careful analysis and excellent report is stated in the Preface as follows:

"The grade crossing problem is of major importance to the railroads, motor vehicle users, and the general public. In many instances, all of these groups are required to participate in the cost of grade crossing improvements and separations. A question often arises as to the relative financial responsibility of each group for specific improvements.

"The Stanford Research Institute recognized in late 1950 that this problem required some organized research effort in order to permit development of a sound public policy by agencies concerned with grade crossing improvements and eliminations. Throughout 1951 and early 1952, the Institute engaged in a study of the problem with particular reference to the California situation. The results of this study are being made available in this report. It is being released as a part of the Institute's continuing program of public service research.

"This report deals with economic aspects of the grade crossing problem. It makes no attempt to cover the many political and sociological problems involved in highway projects generally and in grade crossing projects particularly. The overall objective of the report is to set forth sound economic principles applicable to the grade crossing problem. After adequate data are not available upon which to base factual conclusions. In such cases, the report presents the economic reasoning supporting the conclusions as stated

"... The Stanford Research Institute hopes that this report will be of some assistance to the transportation industry, government agencies, and the public in their consideration of the grade crossing problem." (Page iii) [23]

It appears in the matters involved in the present decision which is in the nature of a test case and a change of policy of the Commission that every available source of information and study should have been before the Commission. The exhaustive report of Stanford Research Institute is a tremendous work of gathering important source material upon this current problem. The report is much too long and

comprehensive to quote, but extracts are given hereafter to show the complicity of the problem and the suggested solution based on rationalization and stable methods of approach.

The Stanford Research Institute in its report of May 1, 1952 entitled "The Railway-Highway Grade Crossing Problem" states in Part 2 relating to "Approaches to Evaluating Grade Crossing Projects" under Section IV the following conclusions:

### ALLOCATING COSTS FOR GRADE CROSSING PROJECTS

#### "Conclusions

1. All grade crossing improvements and eliminations provide joint services or products for motor vehicle users, the railroads, and the general public.
2. The costs of grade crossing improvements and eliminations are joint costs.
3. When products or services are produced jointly, their costs are joint and cannot be allocated directly to each product. In such cases, joint costs can only be distributed in accordance with the relative demand for the product or services.
4. The relative demands of the several beneficiaries for the services of grade crossing improvements and eliminations should determine the distribution of the total (joint) [24] costs of the projects among the beneficiary groups.
5. The relative demands of the beneficiary groups should be measured by the relative value of benefits each receives from the grade crossing projects.
6. There is no essential difference in sound principles of cost allocation between (a) grade crossing



improvements, (b) separations, and (c) opening and closing of crossings.

7. Any distribution of costs based upon whether the highway or railway was first located at the crossing is not economically sound.

8. Almost all states have statutes either fixing the distribution of costs for crossing projects or vesting the power to do so in a public body.

9. Two significant tendencies have developed over recent years in distribution of the costs for grade crossing projects. First, the percentage of total costs assigned to railroads has declined. Second, state laws are providing increasingly for distribution of costs on the basis of benefits received.

10. The United States Supreme Court has formally recognized the validity of distributing costs for grade crossing projects among beneficiary groups on the basis of relative benefits received.

11. The policy of distributing costs for projects undertaken with Federal-aid funds by assigning arbitrary values of benefits to the railroads [25] and to the general public is economically unsound.

12. Prior to 1933, the California Public Utilities Commission assigned costs for projects to the railroads and the public generally on a fifty-fifty basis. Subsequently, the Commission adopted the benefit basis for cost distribution on crossing projects.

13. In 1949, the California Public Utilities Commission gave evidence of reverting to its earlier unsound fixed-percentage basis of cost assignment on grade crossing projects. The particular case reflecting the change in Commission policy was presented for a rehearing, and no decision on the rehearing has yet been rendered by the Commission." (Page 44)

The report of the Stanford Research Institute then points out:

### **FIXED-PERCENTAGE BASIS NOT SOUND**

"A policy of assigning costs for a grade crossing improvement to railroads (or to other beneficiary groups) on the basis of a fixed percentage of total costs is no more realistic or economically sound than is an assumption that the economic nature and character of the grade crossing area, crossing usage, and highway development and usage may be identical as between grade crossings. Economic variations relating to various grade crossings are so great that a fixed-percentage basis of cost allocation cannot be economically sound." (Page 47) [26]

The report of the Stanford Research Institute then went on to observe that:

### **THE SUPREME COURT ON COST DISTRIBUTION**

"Legal responsibility of the railroads for assuming costs on grade crossing projects was defined by the Supreme Court in a 1914 ruling based, of course, upon economic conditions in existence at the time.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways . . ."

<sup>9</sup>Chicago, M. St. P. R. Co. vs. Minneapolis (1914) 232 U.S. 437, 58 L. Ed. 674.

In another 1914 case, the same court said:

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is . . . deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court . . . (citing cases).<sup>10</sup>

"Under these decisions it may be inferred that there is no legal limit to the portion of the total costs for grade crossing improvements and eliminations which may be assigned by public bodies to the railroads. These cases were, however, predicated upon a different set [27] of economic facts than exists today. The requirement for grade crossing improvements in 1914 was a requirement for increased public safety, and not basically a demand for increased free flow of traffic at crossings as is the case today.

"Freund has made the following observation:

"It is an elementary principle of equal justice that where the public welfare requires something to be given or done, the burden be imposed or distributed upon some rational basis, and that no individual be singled out to make a sacrifice for the community. The principle lies at the foundation of the law of taxation, and applies equally to the police power. With reference to the latter it may be expressed by saying that to justify the imposition of a burden there must be some connection of causation or responsibility between the person selected or the right impaired and the

<sup>10</sup>*Missouri Pacific R. Co. v. Omaha* (1914), 234 U.S. 127, 59 L. Ed. 160.



danger to the public welfare or the public burden which is sought to be avoided or relieved.<sup>11</sup>

"The Supreme Court, while recognizing the regulation of grade crossings as a legitimate exercise of the police power of the states, has indicated that this power is subject to a constitutional limit and that it may not be exerted arbitrarily or unreasonably. The court, in a 1935 case involving allocation of costs of a grade crossing elimination, took into full account the change in economic conditions since its earlier decisions. It also recognized the necessity for [28] justifying a burden on the railroads for such costs. The Court said:

"The railroad has ceased to be the prime instrument of danger and the main cause of accident. It is the railroad which now requires protection from dangers incident to motor transportation. Prior to the establishment of the Federal aid system . . . highways . . . served, in the main, local traffic. The long distance traffic was served almost wholly by the railroads and the water lines. Under those conditions the occasion for separation of grades was mainly the danger incident to rail operations; and the promotion of safety was then the main purpose of grade separation. Then it was reasonable to impose crossings; and the imposition was rarely a hardship . . . The need for eliminating existing crossings and the need of new highways free from grade crossings arose usually from the growth of the community in which the grade separation was made; this growth was mainly the result of the transportation facilities offered through the railroad; the separation of grade crossings was a normal incident to the growth of

<sup>11</sup>Ernst Freund, *The Police Power*, p. 635.

rail operations; and as the highways were then feeders of rail traffic, the community's growth and every improvement of highway facilities benefited the railroad. The effect upon the railroad of constructing . . . (modern) highways . . . is entirely different. They are not feeders of rail traffic. They deplete the existing rail traffic and the revenues of the railroads . . . The avoidance . . . (by grade separation) of traffic interruptions incident to crossing at grade are now of far greater importance to the highway users than it is to the railroad crossed, for the rail operations are few, those of motor vehicles very numerous.<sup>12</sup>

"This position by the Supreme Court indicates the legal as well as economic necessity for taking into account the reasons for grade crossing improvement and elimination projects, and for considering relative benefits, in distribution of [29] costs for grade crossing projects." (Page 48-9)

It was further pointed out in the Stanford Research Institute Report the following under the Section heading of:

### **ACCIDENTS AS A BASIS FOR JUSTIFICATION OF GRADE CROSSING PROJECTS**

#### **"Conclusions**

1. Public safety remains the publicized basis of demand for railway-highway grade crossing improvements or eliminations, although the principal basis is actually the demand for greater conveniences in highway travel.

<sup>12</sup>Nashville, C. St. L. R. Co. vs. Walters (1935), 294 U.S. 405, 79 L. Ed. 949.

2. If only public safety were involved, adequate protection (except against careless drivers) could be obtained in most instances at less cost by installing highly effective protective devices than by constructing separations.

3. Grade crossing accidents in the United States have decreased slightly since 1934 even though there has been an increase in the number and use of motor vehicles on the highways. There has been a marked tendency toward relative improvement in the hazard situation.

4. Grade crossing accidents in the nation as a whole are not overly significant when compared with total highway accidents. Grade crossing accidents in California have in recent years declined in significance relative to total highway accidents. [30]

5. Most highway accidents result basically from increased highway travel, inadequate highway capacity, and lack of caution by motor vehicle drivers.

6. The reduction of highway accidents involves three approaches: (a) additional safety provisions in vehicle construction, (b) regulation of highway uses and education of users, and (c) design and construction of highways to provide additional built-in safety.

7. Motor vehicle users have a right to receive and public bodies a duty to provide adequate protection and warning devices at railway-highway grade crossings. If these warning and protective devices are provided but ignored, motor vehicle users should bear the economic responsibility for accidents." (Page 16)

When the Commission, in view of the record and the evidence that the primary purpose of the proposed separation was to eliminate delay to vehicles, proceeded to apportion the cost at 50% to the railroad, the Commission acted



arbitrarily, without authority of law and violated the due process clause. Mr. Justice Brandeis in the case of *Nashville C. & St. L. R. Co. vs. Walters* (1935) 294 U.S. 405, 79 L. Ed. 949, carefully pointed out:

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience upon it

and then stated the railroad had no duty to provide separations where the main purpose of grade separation was to further uninter-[31] rupted rapid movement by vehicle rather than the promotion of safety.

The Commission in reverting to a 50 per cent formula is shutting its eyes to modern economic trends and the obvious directions of the Supreme Court of the United States. It is a backward rather than a forward step.

The Commission has failed to pursue its authority regularly or at all so far as proportioning costs between the parties is concerned, has acted beyond the scope of its authority, and its requirement in the circumstances amounts to confiscation in violation of the due process and other clauses of the Constitution of the United States and of the State of California.

In addition the Commission in apportioning costs on a 50% basis has acted so arbitrarily and unreasonably as to deprive Southern Pacific Company of its property without due process of law, in violation of the 14th Amendment to the Federal Constitution and Article I, Section 13 and 14 of the California Constitution. (*Nashville, C. St. L. R. Co.*

*ex. Wallers*, 224 U.S. 405, 79 L. Ed. 949; *Southern R. Co. vs. Virginia*, 290 U.S. 190, 78 L. Ed. 260).

Such action also amounts to an undue burden on interstate commerce in violation of the commerce clause of the Federal Constitution, and violates the policy in favor of economical railroad operation, set forth as the National Transportation Policy (54 Stat. L. 899). [32]

## XIX

**The Commission's Order Failed to Consider the Evidence Relating to the Steel and Copper Restrictions with the Result the Order Requires Impossibilities.**

The Commission, by its decision and order, has acted without evidence in ordering, in paragraph 7 of the order (page 17) that the grade separation be commenced within one year and completed within two years after the date of the Commission's order, (and which later date is an arbitrary date not the date the order becomes effective). There is nothing in the record to indicate that steel and copper will be available within one year or two years from the date of the order. Further, there is nothing in the record to indicate that the structure can be completed within two years after the date of the Commission's order. The Commission made no finding of fact and no finding of ultimate fact on the subject. Thus the Commission, in purporting to impose a time limit for, first, the commencement of the construction, and, second, for the completion of the construction of the grade crossing, has acted without supporting evidence, and has thus failed to pursue its authority regularly or at all. In fact, the evidence is directly to the contrary.

The Opinion at page 10, lines 26-28, summarizes the testimony of the Assistant to the Chief Engineer of the Southern Pacific Company as follows:

"It was his testimony that the possibility of securing steel and other necessary metals and cement for the project was very uncertain."

The testimony given on November 1, 1951, is found at Rep. Tr. page 272, line 26, to page 273, line 11, as follows:

"In my opinion, the situation is now so nebulous that I would hesitate to make a recommendation that it could even be started within a three-year period, assuming, of course, that the defense program is continued at either the [33] same rate, and particularly if it is accelerated.

"Commissioner Huls: Pardon me. If the critical situation were relieved, let's say, within the next six months, so that normal steel demands were met in normal delivery times, would your opinion be the same? A. Of course, if we get back to a normal period, my opinion, I would fix it a year shorter, a two-year period rather than a three-year period."

and at Rep. Tr. p. 309, l. 4-10, the following testimony was given on November 29, 1951:

"Mr. Lauten: Mr. Paul, in your direct testimony you stated that you had recently talked with the Bureau of Public Roads about grade separation projects, and I believe you stated that they felt unless the project is something that is absolutely vital to defense work, it should not be undertaken at this time. Was that correct?

"A. That is correct."



Since the above testimony was given on November 1 and 29, 1951, we have not returned to a normal period. In fact, the steel industry is in the grips of a long strike. What the future holds is not known. It is submitted that the Commission has exceeded its jurisdiction and will require an impossibility when it required in paragraph 7 of the order (page 17) that the parties commence construction within one year and complete the construction within two years. The addition to the order of the words "unless further time is granted by subsequent order" means nothing in view of the Commission's failure to follow the above quoted uncontradicted evidence upon the subject.

Southern Pacific Company believes that the Commission has purported to require an impossibility; yet if the decision is allowed [34] to stand Southern Pacific Company might be subject to penalties for failure to do the impossible. Thus, the Commission, in purporting to impose a time limit for the commencement and completion of the grade separation, has acted without supporting evidence and has thus failed to pursue its authority regularly or at all.

Reference is also made to Paragraph VII-B of the Southern Pacific Company's Brief (page 31) for a further discussion of this subject. [35]

## XX

### **The Commission's Order Violates Statutory Provisions and the Commission's Order is Void**

The Public Utilities Code (and Public Utilities Act of 1951) provides under the Chapter Heading of "Hearings and Judicial Review" in Section 1705, as follows:

“ \* \* \* After the conclusion of the hearing, the Commission shall make and file its order containing its decision. A copy of such order, certified under the seal of the Commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided. \* \* \* ”

The order in Decision No. 47420 provides:

“The effective date of this order shall be twenty (20) days after the date hereof.”

The decision and order were not served personally but by mail. The decision and order is dated June 30, 1952, but was not received in the mail by the attorney of Southern Pacific Company until July 3, 1952. This delay in service is of tremendous importance when an application for a rehearing is being prepared under the provisions of Section 1733 of the Public Utilities Code when it is desired to file an application for rehearing 10 days or more before the time the order takes effect.

The Statute presents two problems. The *first* is the meaning of the words “except as otherwise provided”. It is submitted this means as otherwise provided by statute. The 20 days after service is a minimum time, and a right given the parties, unless the statute otherwise provides. The statute does provide for additional time in the last sentence of Section 1705, where the statute provides:

“If the Commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, \* \* \* .”

Nowhere is the Commission given the right, by Statute, to shorten the 20 day period. [36]

The second problem is what is the meaning of "20 days after that service thereof". (Section 1704 Public Utilities Act) The Commission in this matter, as in all matters, usually serves the corporation or person, or his or its attorney, a certified copy of the order by mailing the same (Rule No. 73, Case No. 4942, Decision Nos. 43994 and 47081 and Section 1705 of the Public Utilities Code). Is the service made at the time of mailing, or upon the receipt of the order?

The general rule regarding service by mail is well stated in 66 Corp. Jur. Sec. 662, as follows:

"Generally, in the absence of statute providing otherwise, personal service cannot be made by mail.",

and, at 66 Corp. Jur. Sec. 663 as follows:

"In the absence of custom, statute, estoppel, or express contract stipulation, when a notice, affecting a right, is sought to be served by mail, *the service is not effected until the notice comes into the hands of the one to be served*, and he acquires knowledge of its contents, \* \* \*"

The Commission's attention is directed to Section 1704 of the Public Utilities Code, which provides in part as follows:

"Service in all hearing, investigations, and proceedings pending before the Commission *may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and may be made personally or by mailing*



It is believed the above language is applicable and it is submitted that the above language gives the Commission the right to serve by mail in all hearings, investigations, and proceedings in accordance with the provisions of the Code of Civil Procedure. Sections 1012, 1013, and 1963 (24) of the Code of Civil Procedure are the applicable sections. Section 1013 provides as follows:

"§1013. Method of Service.—In case of service by mail, the notice or other paper must be deposited in the United States Post office, or a mail box, sub-post office, sub-station or mail chute, or other like facility regularly maintained by the Government of the United States, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by [37] him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full one hundred miles distance between the place of deposit and the place of address, if served by different post offices, but such extension shall not exceed thirty days in all."

Section 1013 of the Code of Civil Procedure is specific in providing that when service is resorted to by mailing, the time within which a right is to be exercised is extended by adding one day for mailing, and one day for each full one hundred miles the mail travels. This statute and construction of the language of the statute was approved and

held valid in *Department of Social Welfare vs. Gandy* (1942) 56 Cal. App. (2d) 209, 215.

The above situation should be compared to the Administrative Procedure Act (not applicable to the Public Utilities Commission) where in Section 11519 of the Government Code it is provided:

"The decision shall become effective 30 days after it is delivered or mailed to the respondent."

This very difference in language in the Administrative Procedure Act as compared to the Public Utilities Code is significant, and the courts will hold that when statutes differ, the legislature meant the difference. (See also 2 Cal. Jur. (2d) 274).

The Commission has adopted its Rule 74 (Case No. 4924 Decision Nos. 43994 and 47081) directly contrary to the statute. A portion of the Commission's Rule 74 is as follows:

"Decisions and orders in complaint or investigation proceedings shall become effective twenty days after service thereof, *unless otherwise provided therein.*"  
(Italics added)

The use of the word "therein" is an attempt by the Commission to change the statute (Public Utilities Code Section 1705) by Rule. [38] The Commission is attempting by rule to cut down the 20 day period provided for in Section 1705 of the Public Utilities Code which includes additional days in the case of mailing, as provided for in Section 1704 of the Public Utilities Code. No commission, by rule, can change a Statute, unless the Statute so provides. The Statute has not so provided. Thus mailing of the certified copy

of the order allows a party under Section 1733 of the Public Utilities Code one additional day for mailing and one additional day for each full 100 miles. As applied to the facts in the present case, where Randolph Karr, attorney for Southern Pacific Company, at 670 Pacific Electric Building, Los Angeles 14, California was served with the certified copy of the order by mail, five additional days plus the twenty days provided by Section 1705 of the Public Utilities Code are necessary to elapse before the order can be effective. As said in Section 1705 of the Public Utilities Code:

"The order shall, of its own force take effect and become operative *20 days after the service thereof.*"

Thus service by mail extended the time of Southern Pacific Company to act under Section 1733 of the Public Utilities Act and additional 5 days, with the result the 20 day period will be extended to July 25, 1952. Yet the order of the Commission has not followed the statutory language that the order is to take effect 20 days after service, but has recited the order is effective 20 days after the date of the order, or July 20, 1952. Such language is void. This is particularly important in computing the time to apply for a rehearing, as well as the 10 or more days before the effective date of the order (Section 1733 of the Public Utilities Code). The Commission is attempting to make the effective date of the order earlier than the effective date under the Statute. If through neglect or delay, or even excusable acts, the Commission did not mail the certified copy of the order to the parties for several days, the Commission by its own act could take [39] away the right of a party to set aside



the order given him under Section 1733 of the Public Utilities Code. It is submitted the language in the order:

"The effective date of this order shall be twenty (20) days after the date hereof"

is void, without authority of law or statute, and in violation of Section 1704 and 1733 of the Public Utilities Code.

Time is of particular importance in a test case such as this matter in connection with properly preparing of applications for rehearing. In the companion case to this matter, decided on June 24, 1952, in Application 29369, Decision No. 47344, the so-called Washington Boulevard Separation of the Santa Fe in the City of Los Angeles, the language in the order was as follows:

"The effective date of this order shall be sixty (60) days after the date hereof,"

while in this case of the same importance and involving similar problems but more money the Commission attempted to make its order effective in 20 days after the date of the order (and contrary to Statute since no order can be effective until 20 days after service of a certified copy of the order).

In Paragraph 3 of the order in this matter (page 16) it is provided the City of Glendale shall do certain things within 120 days from the date of the order rather than from the time the order is effective. The whole scheme of the order in basing the time element upon the date of the order (when the order is not effective, and will not become effective until after service) rather than on when the order becomes effective, renders the order void not only for uncertainty, but as a matter of law.

Section 2101-2113 of the Public Utilities Code provides that failure to comply with the orders of the Public Utilities Commission is a crime, and Section 2108 of the Public Utilities Code provides that in the case of a continuing violation each day's continuance shall be a separate and distinct offense. When does [40] the violation commence? The Commission's order provides the crime commences 20 days after the date of the order irrespective of whether the order has been served as to one, all, any, or none of the parties. Such an order has been held void by our courts. The fact the courts can determine whether the particular person has come within the terms of the Statute, that is, whether service has been made or not—will not validate a statute where it cannot be determined from the statute itself whether or not the defendants' acts are illegal. (In *Re Bell* (1942) 19 Cal. (2) 488, 496, 122 Pac. (2) 22; In *Re Pepers* (1922) 189 Cal. 682, 688, 209 Pac. (2) 896.) Thus the failure of the order to follow the Statute renders the order void. One must be able to determine from the order itself whether the order is valid, and here the Commission has provided for an effective date that not only does not follow the Statute, but is contrary to the Statute, since the statute provides that the order is not effective until 20 days after service of a certified copy of the order. [41]

It is respectfully submitted, therefore, that a rehearing be granted in the above-entitled proceedings, and that said Decision No. 47240 be set aside and annulled.

Dated at Los Angeles, California, July 9, 1952.

SOUTHERN PACIFIC COMPANY

By B. W. MITCHELL  
Superintendent

E. J. FOULDS  
65 Market Street  
San Francisco, California.

RANDOLPH KARR  
670 Pacific Electric Building  
Los Angeles 14, California

By RANDOLPH KARR  
Randolph Karr  
*Attorneys for*  
*Southern Pacific Company [42]*



**Exhibit E**

Decision No. 47597

*Before the Public Utilities Commission  
of the State of California*

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

Application  
No. 32385

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Feliz Boulevard in the cities of Los Angeles and Glendale, County of Los Angeles, State of California, and the division among the affected parties of the cost incident to such separation.

Case  
No. 5327

**ORDER DENYING REHEARING AND MODIFYING DECISION**

Southern Pacific Company having filed its petition for rehearing respecting Decision No. 47420, rendered herein,

the Commission having considered said petition and being of the opinion that no cause has been shown for granting the same,

IT IS ORDERED that said petition for rehearing be and the same is hereby denied.

Decision No. 47420 is hereby modified by substituting "spur track" for "yard track" on line 11 at page 2, thereof, and by substituting "\$746,600" for "\$746,000" on line 26 at page 15 of said deci- [1] sion.

Dated, San Francisco, California, this 19th day of August, 1952.

R. E. MITTELSTAEDT

*President*

JUSTUS F. CRAEMER

HAROLD P. HULS

PETER E. MITCHELL

*Commissioners*

Commissioner Kenneth Potter, being necessarily absent, did not participate in the disposition of this proceeding. [2]

*Appendix*  
***Exhibit F***

Application No. 32385

Exhibit No. 2

Witness.....

Date.....

Commissioner.....

*Public Utilities Commission*  
*State of California*  
*Transportation Department*

**RESULTS OF AN  
ENGINEERING STUDY  
RELATIVE TO EFFECTING  
A GRADE SEPARATION BETWEEN  
SOUTHERN PACIFIC CO'S TRACKS**

**AND**

**LOS FELIZ BOULEVARD  
CITIES OF LOS ANGELES AND GLENDALE**

Application No. 32385

San Francisco, California

Sept. 15, 1951



**PART V****Economic Justification for the Separation**

The Los Feliz Boulevard grade crossing is now protected by manually operated crossing gates over the entire 24-hour period. The accident record during the period January 1, 1926 to March 31, 1951 is shown on an accompanying table, there being a total of 14 collisions between trains and automobiles at this crossing in the last 25 years resulting in one death and nine injuries.

Approximately 27,000 vehicles pass over this intersection in a 24-hour period and the gates are lowered about 70 times a day. Checks indicated the longest delay was approximately 8½ minutes; the total vehicular delay for a 24-hour weekday amounted to approximately 4,500 vehicle minutes, or 75 vehicle hours.

It is not possible to determine with any fine degree of accuracy the public benefits that might accrue from a grade separation at this location. However, certain items do lend themselves to assigned monetary evaluation and these are listed below on an annual basis.

Vehicular delay	\$57,362
Railroad operation cost, gatemen, maintenance, etc.	14,053
Accident damages paid by railroad	475
	<hr/>
	\$71,890
Depreciation on railroad portion of structure	6,991
Maintenance on same (Excluding track)	1,620
	<hr/>
	8,611
Net annual savings	<hr/>
	\$63,279
Above savings capitalized at 3%	\$2,109,000
Above savings capitalized at 4%	1,582,000
Above savings capitalized at 5%	1,266,000

No allowance has been made for:

(a) Depreciation on retaining walls; wing walls, or for maintenance on the slopes.

(b) The loss of life or injuries to persons resulting from accidents at this crossing. Such casualties do however result in a real economic loss to the community as well as cause pain and suffering to the persons involved and to their families. These are intangible items which do not lend themselves to an accurate appraisal in dollars.

(c) Income tax on any potential savings.

The hourly economic loss due to vehicular delay has been estimated at \$2.00 for automobiles, \$5.30 for trucks, and \$13.50 per hour for buses.

The figure for the automobile consists of 2¢ per minute for delay time, which is the value used by the California Division of Highways, plus one cent per minute representing the cost of idling the automobile, as developed by the Institute of Transportation and Traffic Engineering at the University of California. This has been arbitrarily raised to \$2.00 per hour to include some panel trucks which were counted along with the automobiles.

The \$5.30 per hour for trucks represents the weighted average of operating costs of trucks of various sizes, developed by the engineers of the Commission in recent rate proceedings. The quoted value of bus delay includes an allowance for the delay to the passengers on board the buses at the Los Feliz crossing.

Further data covering the traffic counts, the development of the annual delay, and the accident record are included on the following pages.

We are indebted to Mr. J. C. Albers, City Engineer of Glendale, and his staff for the traffic counts and delay figures. [29]

**ACCIDENT STATISTICS  
LOS FELIZ BOULEYARD AND SOUTHERN PACIFIC TRACKS  
GLENDALE, CALIFORNIA  
TRAIN-AUTOMOBILE COLLISIONS**

Year	Number	Killed	Injured	Year	Number	Killed	Injured
1926	1	—	—	1939	1	1	—
1927	—	—	—	1940	—	—	—
1928	—	—	—	1941	—	—	—
1929	—	—	—	1942	1	—	1
1930	1	—	2	1943	1	—	1
1931	—	—	—	1944	1	—	—
1932	1	—	1	1945	—	—	—
1933	—	—	—	1946	1	—	—
1934	—	—	—	1947	—	—	—
1935	—	—	—	1948	4	—	4
1936	—	—	—	1949	1	—	—
1937	—	—	—	1950	—	—	—
1938	—	—	—	1951*	1	—	—
*—3 Months					14	1	9
Average per year					0.55	0.04	0.37

**Property Damage (25.25 Years)**

	Railroad	Vehicle	Total
Gates and Miscellaneous Accidents	\$2,931	\$ 221	\$3,152
Train-Auto Collisions	34	2,360	2,394
	\$2,965	\$2,581	\$5,546
Average per Year	\$ 117	\$ 102	\$ 219

The 9 persons injured were disabled for a total of 148 days, or 5.85 days per year. [30]



**TOTAL VEHICULAR DELAY TIME  
LOS FELIZ BOULEVARD AND SOUTHERN PACIFIC TRACKS  
GLENDALE, CALIFORNIA**

	<b>Autos and Panel Trucks</b>	<b>Other Trucks</b>	<b>Buses</b>		<b>Total Delay Time</b>
Sunday 6-17-51	4,213	9	9	4,231	Vehicle Minutes
Sunday 6-17-51	70.22	15	15	70.52	Vehicle Hours
Monday 6-18-51	3,346	125	42	3,513	Vehicle Minutes
Wednesday 6-20-51	5,299	146	21	5,466	Vehicle Minutes
Total (2 Weekdays)	8,645	271	61	8,979	Vehicle Minutes
Average Weekday	4,323	135	32	4,490	Vehicle Minutes
Average Weekday	72.05	2.25	.53	74.83	Vehicle Hours
<b>Annual Delay</b>					
254 Weekdays	18,300	572	135	19,007	Vehicle Hours
111 Sat. Sun. & Hol.	7,794	17	17	7,828	Vehicle Hours
365	26,094	589	152	26,835	Vehicle Hours
Cost per hour	\$2.00	\$5.30	\$13.50	—	
Annual delay cost	\$52,188	\$3,122	\$2,052	\$57,362	

[31]

**VEHICLE VOLUME COUNTS  
LOS FELIZ BOULEVARD AND SOUTHERN PACIFIC TRACKS  
GLENDALE, CALIFORNIA**

Item	Sun. 1-8-50	Sun. 6-17-51	Thur. 12-22-49	Mon. 6-18-51	Wed. 6-20-51
<b>Vehicle Count—24-Hour Period</b>					
Automobiles and Light					
Panel Trucks	—	27,138	—	24,642	25,331
Tank Trucks	—	1	—	18	26
Trailer Trucks	—	7	—	119	106
Other Trucks	—	105	—	917	1,024
Buses	—	99	—	188	198
Motoreycles	—	75	—	102	118
Total Vehicles	70,807	27,425	26,675	25,946	26,803
Pedestrians	—	351	—	486	594
<b>Total Vehicles</b>					
Peak 15-minutes	393	569	608	657	581
Peak hour	1,399	2,044	2,271	2,329	2,188
Number of times gates were lowered	—	59	—	71	69
Maximum number of times in one hour	—	6	—	9	7
Longest delay	—	8' 6"	—	6' 3"	8' 30"

# Exhibit G

## "LIST OF GRADE SEPARATIONS CONSTRUCTED IN CALIFORNIA, 1934-1950, INVOLVING SOUTHERN PACIFIC LINES, SHOWING APPORTIONMENT OF COSTS AND BASIS THEREOF"

Sheet 1 18

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	\$ SP Co.	\$ Others	\$ Total
WESTERN DIVISION													
Cordelia (Original)	1937	UP	26355	9-25-33	35270	X			0	100			100,000
Cordelia (Widening)	1950	UP				X			0	100			140,000
San Leandro Creek (East Shore Freeway)	Under Const.	OH	38893	4-23-46	72604	X			0	100			240,000
19th Ave. Oakland (East Shore Freeway)	1949	OH	40511	7-8-47	76058	X		X	10% SP & WP	90	16,500 SP 5,500 WP	198,000	220,000
High St., Oakland (East Shore Freeway)	1950	OH	41964	8-17-48	78998	X			0	100			320,000
42nd Ave., Oakland (East Shore Freeway)	1950	UP	41964	8-17-48	78998	X			0	100			480,000
5th St., Oakland (East Shore Freeway)	1948	OH	39199	7-9-46	74487	X			0	100			1,110,000
Fruitvale Ave., Oakland (East Shore Freeway)	1950	OH	38271	10-2-45	70548	X			0	100			265,000
McConnell	1934	UP	25889	5-1-33	34754		X				15,000	Balance	80,000
Maritime St., Oakland	1942	OH	34958	1-27-42	54627	X			0	100			200,000
Bay Bridge Approach, Oakland (Crossing A-6.38-A)	1936	OH	27773	2-25-35	37740	X			0	100			125,000
Bay Bridge Approach, Oakland (Crossing A-6.42-A)	1936	OH	27773	2-25-35	37740	X			0	100			125,000
										Subtotal	27,000		3,405,000

Appendix



Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	\$ SP Co.	\$ Others	\$ Total
Ashby Ave., Berkeley	1935	UP	27371	9-17-34	37057	X			0	100			165,000
University Ave., Berkeley	1939	OH	31706	1-30-39	47838	X			0	100			190,000
Albany	1936	OH	28286	10-17-35	47081	X			0	100			200,000
Davis	1941	UP	22969	4-2-40	49824	X			0	100			200,000
Nichols Road, Nichols	1948	OH	41046	12-17-47	77341	X			100				12,000
Turlock	1940	OH	31385	10-24-38	46347	X			0	100			185,000
Livingston	1939	UP	30246	10-18-37	45142	X			0	100			135,000
Adeline St., Oakland	1942	OH	34765	11-18-41	54627	X			0	100			100,000
Niles	1937	UP	28722	4-13-36	40177	X			0	100			130,000
Altamont (D-52.0-A)	1938	OH	30104	9-7-37	43469	X			0	100			85,000
Altamont (D-58.0-A)	1938	OH	30102	9-7-37	43426	X			0	100			90,000
Tracy	1936	OH	28324	11-4-35	39099	X			0	100			175,000
Stockton	1937	UP	28326	11-4-35	39082	X			0	100			250,000
First St., Niles	1938	UP	28722	4-13-36	40177	X			0	100			80,000
Hwy, Niles	1938	UP	28722			X			0	100			110,000
Subtotal												2,107,000	

Ford Ranch Road, Niles-Shinn	1937	UP	28722	4-13-36	40177	X			0	100			45,000
Niles-Shinn (DAB-42.4-BC)	1937	UP	28722			X			0	100			45,000
105th Ave. & San Leandro St.	1937	UP	28786	5-4-36	40316	X			0	100			100,000
Agnew	1936	UP	27927	4-29-35	38093	X			0	100			100,000
Napa	1949	OH	41329	3-16-48	77888	X			0	100			100,000
<b>SACRAMENTO DIVISION</b>													
Andora (Reconstruction)	1949	UP	No Order Issued						0	100			5,000
12th St., Sacramento (Reconstruction)	1950	UP	41189	4-3-48	77533	X			0	100			890,000
Washington St., Roseville	1950	UP	41198	2-10-48	83357	X		X	10	100	128,477	1,156,289	1,284,766
North Auburn	1948	UP	39392	9-10-46	74028	X			0	100			100,000
East Auburn	1947	OH	37507	12-28-44	67105	X			0	100			120,000
White Rock	1949	OH	41428	4-6-48	78013	X			0	100			90,000
Subtotal													2,889,766

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	\$ SP Co.	\$ Others	\$ Total
Swanston	1945	UP	37511	11-28-44	67104	X			0	100			
"I" St., Sacramento	1938	OH	28976	7-9-36	40793	X			0	100			40,000
(Reconstruction)													
16th St., Sacramento	1936	UP	No Order Issued						0	100			200,000
(Widening)													
Foothill	1946	UP	39392	9-10-46	74028	X			0	100			60,000
Colfax	1938	OH	31045	6-27-38	45579	X			0	100			100,000
Yuba City	1946	OH	38495	12-10-45	71102	X			50	50	35,882	35,882	71,764
Bowman (EB Track)	1949	OH	42661	3-29-49	80978	X			0	100			90,000
Bowman (WB Track)	1949	OH	42661	3-29-49	80978	X			0	100			90,000
												Subtotal	651,764

94

SHASTA DIVISION

Bailey Hill (Hornbrooke-Hilt)	1948	UP	39394	9-10-46	74029	X			0	100			110,000
Black Butte	1949	OH	37560	12-19-44	81092	X			0	100			200,000
Red Bluff (Replacement)	1936	UP	28417	12-2-35	41128	X			0	100			140,000
Redding	1939	UP	30244	10-18-37	43749	X			0	100			110,000
Weed	1940	OH	32558	11-14-39	49168	X			0	100			90,000

COAST DIVISION

South San Francisco (Bay Shore Freeway)	1949	OH	38966	5-14-46	72881	X			0	100			1,230,000
Sanborn Rd., Spreckels Jet.	1948	OH	39395	9-10-46	73713	X			0	100			245,000
Waldorf	1949	OH	41269	3-2-48	77711	X			0	100			95,000
North Aptos	1948	UP	40571	7-29-47	76158	X			0	100			140,000
South Aptos	1948	UP	40572	7-29-47	76159	X			0	100			130,000
												Subtotal	2,490,000

Appendix

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	\$ SP Co.	\$ Others	\$ Total
Soledad	1936	UP	28373	11-18-35	39165	X			0	100			140,000
Madrone	1933	UP	25588	1-30-33	35099		X		40	60	34,400	51,600	86,000
Embarcadero Rd., Palo Alto	1936	UP	28325	11- 4-35	39084	X			0	100			100,000
University Ave., Palo Alto	1941	UP	32182	7- 8-39	48312	X			0	100			800,000
Polhemus St., San Jose	1940	UP	32396	9-26-39	48841	X			0	100			100,000
Lafayette St., Santa Clara	1936	UP	28375	11-18-35	39844	X			0	100			90,000
Almaden St., San Jose	1936	UP	28323	11- 4-35	39018	X			0	100			75,000
Prunedale-Castroville	1942	OH	34736	11- 4-41	54508	X			0	100			90,000
Salinas	1936	UP	28196	8-26-35	38697	X			0	100			200,000
Dolan Road, Castroville	1937	OH	29612	3-22-37	42369	X			0	100			80,000
Cuesta	1938	OH	30174	9-27-37	43605	X			0	100			150,000
Casmalia	1943	OH	35942	11- 5-42	57927	X			0	100			100,000
											Subtotal	2,011,000	

**SAN JOAQUIN DIVISION**

[illegible]



Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	\$ SP Co.	\$ Others	\$ Total
LOS ANGELES DIVISION													
El Rio (Widening Only)	1948	UP	41756	6-22-48		X			0	100			240,000
Benham (Widening Only)	1950	OH	43402	10-11-49	82363	X			0	100			100,000
Kaiser	1948	OH	39599	11-4-46	F-3809	X					95,500	104,500	200,000
Salsipuedes St., Santa Barbara	1948	OH	39284	7-30-46	74030	X			0	100			450,000
Anaheim St., Wilmington	1948	OH	38174	8-28-45	70186	X			0	100			800,000
Nicholson Ave., Wilmington	1948	OH	38769	3-12-46	70186	X			0	100			150,000
San Fernando Rd., Burbank	1942	UP	33663	11-12-40	51599	X			0	100			225,000
Figueroa St., L. A.	1937	OH											
Figueroa St., L. A.	1942	OH	28416	12-2-35	39226	X			0	100			400,000
Vignes St., L. A.	1940	UP											
Macy St., L. A. (Laupt Job)	1940	UP	26399	10-4-33	38843		X				178,402	1,227,058	1,405,460
Subtotal											273,902	1,331,558	3,970,460

<b>Sheet 9</b>													
Daly St., L. A.	1939	OH	31176	8-8-38	45866	X			0	100			100,000
Soto St., Aulant	1936	OH	28395	11-25-35		X			0	100			85,000
Rosemead Blvd., El Monte	1938	UP	30527	1-17-38	44384	X			0	100			120,000
Pomona	1940	OH	31559	12-12-38	47397	X			0	100			130,000
Beaumont	1936	OH	28392	11-25-35	39532	X			0	100			125,000
Fingal	1940	UP	31560	12-12-38	47095	X			0	100			135,000
Myoma	1936	OH	28360	11-12-35		X			0	100			135,000
Dulah-Ventura	1935	OH	26749	1-22-34		X			0	100			110,000
(Replacing old subway)													
Lankershim Blvd., Hewitt	1939	UP	30529	1-17-38	44385	X			0	100			125,000
Tunnel (Reconstruction)	1935	UP	25818	4-10-33		X			0	100			100,000
Subtotal													1,165,000

Location	Year Built	Over or Under	PUC Order No.	Date of Order	Audit No.	BASIS OF PUC ORDER			APPROXIMATE COST				
						Agreement Between Parties	PUC Decision	On Benefits	% SP Co.	% Others	\$ SP Co.	\$ Others	\$ Total
N.W.P. R.R.													
Linden Lane, San Rafael	1948	UP	34763	11-18-41	NWP-3787	X			0	100			140,000
S.D. & A.E. RY.													
La Mesa (Alvarado Canyon)	1949	OH	41471	4-13-48	SDAE-1196	X			0	100			150,000
La Mesa (El Cajon Blvd.)	1938	OH	30772	4-11-38	SDAE-253	X			0	100			130,000
"F" St., Chula Vista	1950	UP	43074	6-28-49	SDAE-1333	X			0	100			170,000
18th St., National City	1950	UP	43074	6-28-49	{	X			10	90	25,067	225,603	250,670
24th St., National City	1950	UP						X					
Subtotal													840,670
Total											564,626		22,058,944

**Exhibit H****SUMMARY OF STATE STATUTES AND PRACTICES  
IN RESPECT TO COST ALLOCATION**

The various provisions applying in the different states are listed below, together with the statute reference. Usually the statutes also provide that the parties may otherwise agree as to the allocation of costs.

*Note:* Whenever in any state any federal funds are used, even in part, the maximum allocation to the railroads is 10 per cent under federal law, and irrespective of state law or practice.\*

**Allocation of 25% or Less to Railroads**

*Florida*—No state funds allocation statute, but a statute of cooperation with Federal Aid-Road Act and use of Federal Funds, with 10% limit to railroads controlling Fla. Stats. Secs. 341.621 and 341.73.

*Indiana*—20% of cost including structures and approaches. Burns Indiana Stats., Secs. 55-1810 and 36-130.

*Maryland*—25% of project on a State Highway. Flack's Code 1939-1947, Art. 89B, Secs. 27 to 32, incl.

*Michigan*—Based on benefit to railroad but not in excess of 15% of cost. Michigan Stats. Ann., Vol. 7, Sec. 9.1145 (1939 Amd.).

*Nevada*—No statute; but Federal funds are used and 10% limit is controlling.

\*Federal-Aid Highway Act of 1944 (58 Stats 838) extended by Federal-Aid Highway Act of 1948 (62 Stats 1105) and extended by Federal-Aid Highway Act of 1952 (Public Law 413, 82nd Congress Chap. 462 enacted June 25, 1952) and United States Bureau of Public Roads General Administrative Memorandum No. 325



*New Jersey*—15% of the cost excluding paving, curbs, walks and guard rails. N.J. Stats. Ann., Title 48, Sec. 48:12.62 (1947 Amd.) and Sec. 48:12-68 (1947 Amd.).

*New Mexico*—Not to exceed 10% of cost between grade separation limits. Comp. Stats., Sec. 74-338.

*New York*—Based on benefits to railroad but not to exceed 15% of project cost; however, railroad's share is nothing on State throughways and arterial routes in cities. Article VII, Sec. 7 of Constitution, and Title 22, McKinneys Consolidated Laws of New York, Secs. 8051 and following.

*Ohio*—15% of cost of project, including structure, approaches, guard rails, drainage, pavement within width of railroad right-of-way, change of railroad grade, right-of-way expense and damages. Secs. 1182, 1182-1 to 1182-21, 6956-22 to 6956-39, and 8869, Page's Ohio Gen. Code Ann.

*West Virginia*—10% of total cost of project, Code of W. Va. (1949), Sec. 1470.

#### **Allocation Fixed by State Agency**

*Arizona*—Set by State Corporation Commission. Sec. 69-229, Code 1939.

*California*—Set by Public Utilities Commission. Sec. 1202, Public Utilities Code. When State Highway Commission funds only (no Federal aid) are used for an elimination involving the closing of an important grade crossing, the practice has been that the railroad pays 10%, but if no important crossing is closed, the State pays 100%. Where Federal funds are involved, the division of cost follows Bureau of Public Road's General Administrative Memorandum No. 325.

*Colorado*—Set by Public Utilities Commission. Sec. 30, Chap. 137, 1935 Col. Stat. Ann.

*Connecticut*—Set by Public Utilities Commission for projects on State highway system. Set by PUC between 50 and 100% for projects not on State system. Secs. 1518 and 1519, Gen. Stat., Rev. of 1930; and Title 40, Chap. 260, Secs. 5487-98 and 2251-4 of General Statutes (Rev. 1950).

*Delaware*—Set by State Highway Department or by Chancellor. Chap. 236 Laws 1937 amending Sec. 22, Chap. 166 Revised Code of Del. of 1935 (Sec. 5741).

*Idaho*—Set by Public Utilities Commission. Sec. 62-301 to 62-305, Idaho Code—1949.

*Illinois*—Set by Illinois Commerce Commission. Sec. 58 of Pub. Util. Act (Rev. Stat., 1951, Chap. 111 2/3 Sec. 62).

*Iowa*—Set by State Commerce Commission. Code of Iowa, 1950, Chap. 478, Sec. 478.21 and 478.23.

*Massachusetts*—Share of cost, exclusive of federal aid, determined by Board appointed for the purpose upon basis of benefits. Ann. Laws, Chap. 159; Sec. 70.

*Minnesota*—Set by Minnesota Railroad and Warehouse Commission and on state trunk highways apportioned on benefits to parties. Chap. 219, Sec. 219.40, Minn. Stat. Ann. (1951).

*Montana*—Set by Board of Railroad Commissioners and the Public Service Commission. Sec. 72-707, Montana Stat.

*Nebraska*—For rural projects, by agreement or by State Railway Commission. For urban projects, set by local authority on a benefit basis. Revised Stats. Neb. Sec. 18-601 to 636 (1949 Amd.) and Sec. 75-430 to 432.

*New Hampshire*—Set by Public Service Commission. Chap. 299, Rev. Laws of New Hamp. 1942, Sec. 4 amended by Chap. 203 Stats. 1951 Sec. 3.

*North Dakota*—Set by State Public Service Commission. N. D. Stat., Secs. 24-0910, 24-0911.

*Oregon*—Set by Public Utilities Commission for all projects except those in cities of 100,000 population or over. Chap. 44, Art. 1, Secs. 113-501, 113-502, 113-513.

*Texas*—Determined by agreement. No law applying.

*Utah*—Set by State Public Utilities Commission. Ann. Code 1943, Sec. 76-4-15.

*Virginia*—State Corporation Commission apportions costs to railroads on benefits. Stat. Ref.: Code of Va. (1950), Sec. 56-366 (1952 Amd.).

*Washington*—State Public Service Commission apportions costs on benefits, except when a new railroad crosses an existing highway (when 100% to railroad). Also law restricted in cities less than 20,000. Revised Code of Wash. (1951) Sec. 81:52.180.

*Wisconsin*—Determined by order of State Public Service Commission. Stats. 1951 Sec. 195.29.

*Wyoming*—Set by State Public Service Commission. Comp. Stat. 1945 (amended 1947), Sec. 64-214.

#### **Allocation Fixed at Not Less Than 50%**

*Alabama*—50% or more, for full width of RR R/W. Title 23, Sec. 35, Code of Alabama—1940.

*Arkansas*—State Highway Commission may join with railroad and pay not more than 50%. Ark. Stat. 1947 Ch. 76-517.



*Georgia*—50% applicable to the structure and 300 feet of approaches on each side from center of tracks. Chap. 95-19, Code of Georgia, Sec. 95-1905.

*Kansas*—50% or more, applies to State highways, no percentage to county highways; exact amount determined by State Highway Commission. Gen. Stat. of Kansas (1949) Secs. 68-414 and 68-509.

*Kentucky*—50%, limited to work on State highways within RR R/W when RR was built across highway before March 23, 1936; 100% in case RR was built later. Fifteen percent when project is in one of three largest cities. Kentucky Rev. Stat. 177.170 and 93.300.

*Louisiana*—50% in cities. Determined by agreement outside cities. Act 1924, No. 38, Secs. 1 and 2; 1928, No. 51, Sec. 1.

*Maine*—50%. Chap. 41, Secs. 63 to 66, and Chap. 84 Secs. 47 to 50; Rev. Stat. 1944.

*Mississippi*—50% across the railroad R/W at State highways. Sec. 8039, Title 30, Miss. Code, (Ann. 1942, Amd. 1948).

*Missouri*—Set by Public Service Commission; provided, in case of State highways, the State Highway Commission bears not more than 50%. Rev. Stat. 1949 Sec. 389.640.

*North Carolina*—In case of underpass, 50% of cost of excavation, superstructure, and foundation through the railroad fill excavation. In case of overpass, 50% of cost of bridge spanning tracks and abutments thereto. General Stats. N. C. Sec. 136-20.

*Oklahoma*—Set by Oklahoma Corporation Commission at 50% or more. 17 Okla. Stat. (1941), Secs. 81, 82 and 84.

*Pennsylvania*—Set by State Public Utilities Commission. Generally, 40 to 50%, except in case of reconstruction the share is about one-third of total cost excluding pavement cost on State highways.

*South Carolina*—50%, with qualifications. Share also may be determined by agreement. Chap. 160-A, Civil Code, 1942, Secs. 8465, a and b, and 8467.

*South Dakota*—Set by State Public Utilities Commission, guided by statute, generally about 50% of project. S. Dakota Code of 1939, Title 28, Chap. 28.11, Sec. 28.1101.

*Tennessee*—50% of project excluding pavement. Sec. 2638 to 2643, Williams Tennessee Code (1934).

*Vermont*—If railroad first—not less than 45%. If highway first—not less than 50%. Chap. 406, Rev. 1947, Vermont Stat., Sec. 9625-9635.

**Exhibit J****SUMMARY OF FACTS**

The Opinion of the Commission (Appendix, pages 20-34) briefly summarizes some of the evidence and exhibits. Certain evidence—such as that relating to drainage—not material to this proceeding has been omitted from this summary.

Los Feliz Road, sometimes called Los Feliz Boulevard, hereafter referred to as Los Feliz, is an east-and-west main highway that crosses the Southern Pacific Company railroad tracks at grade. The westerly side of the railroad right-of-way is the boundary line of the City of Los Angeles on the west, and the City of Glendale on the east, both of which cities are located in the County of Los Angeles. (Ex. 19) Los Feliz carries about 27,000 vehicles a day (Exhibit 2), while the railroad operates about a maximum of 70 train movements across Los Feliz (Rep. Tr. pp. 32-33) (including main line passenger, freight and switching movements) (Exhibit 2). San Fernando Road is a north-and-south State and Federal Highway (U.S. 99), located about 850-1000 feet east of the railroad and parallel to the railroad. San Fernando Road handles about 40,000 vehicles a day, and Los Feliz intersects San Fernando Road at right angles.

The Southern Pacific railroad right-of-way in question was acquired in 1873 (Exhibit 11) and a railroad constructed thereon in 1874 (Rep. Tr. p. 238). Thereafter, some time between 1887 and 1912, Los Feliz was established and first used as a crossing of the railroad (stipulation, Rep. Tr. p. 225-226).



Due to topography, Los Feliz is an important highway between various geographical population centers in Southern California (Rep. Tr. p. 19-20). It serves the population centers of West Los Angeles—Hollywood, San Fernando Valley, La Crescenta Valley, Antelope Valley, San Gabriel Valley and the Harbor (Rep. Tr. p. 20 and 26). There is a 170-square-mile area of highly urbanized development that pours highway traffic through Los Feliz because of the "mountain pass or bottleneck of highways, or topography" (Rep. Tr. p. 21, lines 2-11). Los Feliz is a major traffic artery on the master plan of highways of the County of Los Angeles, the City of Los Angeles, and the City of Glendale (Rep. Tr. p. 23, lines 15-17). Los Feliz will receive increased traffic when the freeways are constructed, as the freeways will permit a greater area of traffic to be tributary to the Los Feliz cross-connection (Rep. Tr. p. 25-26).

Los Feliz is a very important segment of the master highway plan of Los Angeles County (Rep. Tr. p. 27), and the failure to separate Los Feliz will cause a weakening and have very serious adverse effect upon the highway system plan of Los Angeles County (Rep. Tr. p. 27). Los Feliz carries over 27,000 vehicles per day (Exhibit 2), including Sundays (Rep. Tr. p. 28, l. 16), on which day the traffic is mainly recreational (Rep. Tr. p. 29, line 15, to p. 30, line 8).

Industrial trucking moves on Los Feliz to reach commercial and industrial centers within the metropolitan area (Rep. Tr. p. 28).

*J. G. Hunter*, Assistant Director and Chief Engineer of the Transportation Department of the Public Utilities Commission, a Commission witness, testified that conferences were called with the interested parties, and these repre-

representatives under his direction, through sub-committees, prepared a report (Rep. Tr. p. 7-8). Exhibit 2 was the culmination of the work of the sub-committees, and was prepared by the witness as chairman of the representatives of the parties working upon the study and as a Commission exhibit. Exhibit 3 (Rep. Tr. p. 16) consists of photographs, detailed maps, and charts of the Los Feliz area and proposed separation (Rep. Tr. p. 17-8).

*J. A. Mellen*, Planning Director of the City of Glendale a Commission witness, testified he was a sub-committee member, for Part I of Exhibit 2, entitled "Related Freeways and Major Highway Arteries" (Rep. Tr. p. 19); that Los Feliz is a road of great importance because of topography (Rep. Tr. p. 19), and leads to many population centers of Southern California (Rep. Tr. p. 20). Some 27,000 vehicles flow through the bottleneck known as Los Feliz (Rep. Tr. p. 21). Los Feliz is an independent route not shown on any of the freeway routes or plans (Rep. Tr. p. 25), and the construction of freeways will not relieve the volume of traffic on Los Feliz (Rep. Tr. p. 25); but the construction of the proposed freeways will throw more traffic into Los Feliz (Rep. Tr. p. 25-6). Because of Los Feliz' natural position, it is quite improbable any other location would be similarly affected (Rep. Tr. p. 26). Major traffic arterials tributary to Los Feliz and shown on officially adopted highway plans are:

"To the west and south, Hollywood Blvd., Sunset Blvd., and Santa Monica Blvd., via Western and Vermont Ave.; Griffith Park Blvd., Rowena Ave. and Sunset Blvd. to Los Angeles; Riverside Drive to Los Angeles; Western Ave. and Vermont Ave. to Torrance, the Los Angeles Harbor and Southwest industrial areas and

bay cities; La Brea Ave. to the International Airport at Inglewood. To the north and east: San Fernando Road, to Burbank and the San Fernando Valley (east end) and to U.S. 99; Brand Blvd. to Glendale, Glendale Ave. and Verdugo Road to the La Crescenta Valley; Glendale Ave. and Colorado Blvd. to Eagle Rock, Pasadena, the upper San Gabriel Valley, Foothill cities and to U.S. 66; and to the Chevy Chase, Flintridge, La Canada and Linda Vista Rd. to Antelope Valley via Glendale Ave., Verdugo Road, the Angeles Crest Highway and the Sierra Highway." (Ex. 2, p. 5)

Los Feliz is a very important segment in the complete highway plan of Southern California (Rep. Tr. p. 27). The most densely populated areas of Los Angeles County use Los Feliz (Rep. Tr. p. 27).

Because of delay and inconvenience to vehicular traffic, there is an enormous economic loss (Rep. Tr. p. 29); the charts and plates attached to Section I of Exhibit 2 show the importance of Los Feliz crossing.

*Hugo H. Winter*, Street and Parkway Design Engineer, Bureau of Engineering, City of Los Angeles, a Commission witness, testified he was chairman of a sub-committee that prepared Part II of Exhibit 2, entitled "Estimate of Cost of Effecting the Los Feliz Separation Including Property Damage," and Part III, entitled "Storm Drain Problem". An underpass was recommended in place of an overpass. He testified as to the details of the underpass, and the estimated costs (Rep. Tr. p. 34-40).

*J. C. Albers*, City Engineer and Street Superintendent of the City of Glendale, a Commission witness, testified regarding Part IV of Exhibit 2, entitled "Traffic Checks". The vehicle count of June, 1951, shows during a twenty-four



hour period there were 27,425, 25,946, and 26,803 vehicles respectively on three different days that crossed the railroad tracks. He developed vehicular delay figures. (Rep. Tr. p. 41-3).

*James K. Gibson*, Supervising Transportation Engineer of the California Public Utilities Commission, a Commission witness, testified regarding Part V of Exhibit 2, entitled "Economic Justification for the Separation" (set forth in full on pages 86-91 of Appendix and made a part hereof by reference). He said that Part V is self-explanatory, that he took the vehicular delay figures that Mr. Albers developed, and assigned an accepted (Rep. Tr. p. 47) monetary value to the vehicular delay (Rep. Tr. p. 45). He likewise determined the railroad's operating costs at the crossing, the costs of watchman and protection of the crossing, and the amount of damages paid by the railroad (Rep. Tr. p. 45), etc. He substantiated the additional depreciation and maintenance of the bridge structure (Rep. Tr. p. 45).

*Mr. Walker Paul*, Assistant to the Chief Engineer of Southern Pacific Company, a Commission witness, testified (October 3, 1951) regarding Part VI of Exhibit 2, entitled "Availability of Critical Materials". Since the report, the steel situation had become extremely acute, and the copper situation was still extremely critical (Rep. Tr. p. 51). The steel situation was such that he could not hazard a guess as to when steel would be available (Rep. Tr. p. 51). It would not be prudent to commence the project until all materials were arranged for or available (Rep. Tr. p. 55); he would not recommend that rights of way be acquired, until it was known how the whole matter could be programmed (Rep. Tr. p. 58).

*J. A. Mellin*, Planning Director of the City of Glendale, recalled as a Commission witness, testified that all trains proceed slowly across Los Feliz (Rep. Tr. p. 67); that San Fernando Road is about 850 feet east of the railroad tracks and crosses Los Feliz at right angles; that during periods of congestion the traffic on Los Feliz backs up from the railroad tracks into San Fernando Road, and causes congestion for three-fourths to a mile on San Fernando Road (Rep. Tr. pp. 69-70). San Fernando Road is a state highway that carries 30,000 to 45,000 vehicles a day (Rep. Tr. p. 70).

*James K. Gibson*, Supervising Transportation Engineer of the California Public Utilities Commission, recalled as a Commission witness, testified that he did not attempt to apportion the cost (Rep. Tr. p. 115) shown in Part V of Exhibit 2 (Appendix pp. 86-91); that his information was that there would be no benefit to the railroad, so far as switching costs were concerned (Rep. Tr. p. 118).

*J. C. Albers*, City Engineer and Street Superintendent of the City of Glendale, recalled as a Commission witness, testified regarding previous traffic counts of Jan. 8, 1950, when 17,807 vehicles were counted, other counts in December, 1949, and January, 1950, and regarding vehicular delay (Rep. Tr. pp. 122-3). The delay to traffic on Los Feliz causes persons who wish to make a right-hand turn from San Fernando Road to Los Feliz to back up and congest San Fernando Road (Rep. Tr. p. 128). San Fernando Road carries approximately 40,000 vehicles per 24 hours, compared to the 25,000 to 27,000 vehicles carried by Los Feliz (Rep. Tr. p. 132).

*Charles G. Beers*, Assistant District Traffic Engineer, California Division of Highways, District 7, testified on behalf of the Division of Highways. He is a licensed engineer and makes special surveys and investigations involving traffic planning (Rep. Tr. p. 148). San Fernando Road is also known as State Highway Route 7 (Rep. Tr. p. 148), and Route 4 (Ex. 9). A special study of traffic conditions was made at Los Feliz and San Fernando Road, and the report is Exhibit 9 (Rep. Tr. pp. 149-156). The delay at San Fernando Road would occur during the peak movement of traffic, when vehicles making right-hand turns from San Fernando Road to Los Feliz would be prevented by an accumulation of vehicles on Los Feliz waiting for the trains to clear (Rep. Tr. p. 152, and p. 3 of Ex. 9). He concluded that train movements across the existing crossing of Los Feliz do affect San Fernando Road traffic on occasions, but the occasions are not regular and minor in effect (Page 3 of Ex. 9, and Rep. Tr. p. 154). There are times when traffic backs up so that it will fill an intersection and block all traffic (Rep. Tr. p. 160). At the intersection of Los Feliz and San Fernando Road there is a sizeable accident record, but it is not considered excessive in view of the large volume on both streets, and the high percentage of trucks (Page 2 of Ex. 9).

*Ralph T. Dorsey*, Principal Traffic Engineer of the City of Los Angeles, for the City of Los Angeles, testified, after it was stipulated that he was thoroughly qualified, and an eminent specialist in his field (Rep. Tr. p. 177), that he had made studies of the traffic conditions at Los Feliz; that in his opinion traffic at Los Feliz and San Fernando Road is



affected by delays at the railroad grade crossing (Rep. Tr. p. 179); that during the peak hour the actual count of vehicles during a 15-minute period exceeds the storage capacity between the railroad and San Fernando Road (Rep. Tr. p. 179-181), so that other vehicles are not able to get into this area.

The future of Los Feliz is that it will carry a great deal of additional vehicular traffic (Rep. Tr. p. 185). The expected population increase will be reflected in a per capita use of automobiles (Rep. Tr. p. 185). There will be a change of traffic trends, adding more vehicles, due to the completion of the Hollywood Freeway (Rep. Tr. p. 185). The building of the Riverside Freeway will add more vehicles (Rep. Tr. p. 185). The widening of Franklin and Western Avenues, now under way in the City of Los Angeles, will remove a restriction from a by-pass, and add vehicles to Los Feliz (Rep. Tr. p. 185). It is because of this expected increase of vehicles that Los Feliz is now being used up to about 50% of its potential use (Rep. Tr. p. 186). Today, without this anticipated increase in vehicular traffic, a delay of 4 minutes at the railroad will back up 151 automobiles in an area that can handle or store 108 (Rep. Tr. p. 187). Additional cars "backlash" across San Fernando Road, and tie-up traffic (Rep. Tr. p. 187-8). Any delay of 4 minutes or more will have an adverse effect on San Fernando Road, because of this backlash (Rep. Tr. p. 188).

When the railroad gates are down, the effect is to backlash and repeatedly tie up San Fernando Road (Rep. Tr. p. 189).

The principal additional benefits to Glendale of the separation would be the elimination of blocking at San Fer-

nando; and the state is benefited because it can move additional traffic on San Fernando Road (Rep. Tr. p. 191).

With the completion of the widening of Franklin and Western Avenues in the City of Los Angeles within a year (Rep. Tr. p. 196), the 380 cars that use Los Feliz within a 15-minute period will increase. It is expected that the future volume of vehicular traffic will increase tremendously, and the present peak will be usual during the off-peak hours (Rep. Tr. p. 197).

A true copy of the original deed to the property in question to the Southern Pacific Railroad Company, for a 100 foot right-of-way in the area in question, dated and recorded in 1873, was introduced into evidence as Exhibit 10 (Rep. Tr. p. 200). A second deed between the same parties, dated and recorded in 1877, relating to a station site on each side of the 100 foot right-of-way, was introduced into evidence as Exhibit 11 (Rep. Tr. p. 201).

Two agreements (of 1936 and 1940) were then introduced as Exhibits 13 (1936) and 14 (1940), between the City of Glendale and petitioner; which agreements gave the City of Glendale an easement across the railroad right of way for Los Feliz, wherein it was provided the grant of the easement for the highway was subject and subordinate to the prior and continuing right of the railroad, to use and maintain its entire railroad right of way and property, in the performance of the railroad's public duty as a common carrier (Ex. 13 and 14, and Rep. Tr. p. 202).

Various letters and correspondence leading up to the execution of Exhibit 13 were introduced as Exhibit 15 (Rep. Tr. p. 204-5).

*Leo C. Johnson*, Chief Draftsman, Engineering Department of the Los Angeles Division of the Southern Pacific Company, a witness for Southern Pacific Company, stated that he was in charge of the drafting room of the Engineering Department, and had in his custody the early documents relating to Los Feliz (Rep. Tr. p. 206-7); that these early documents are used by him and the 40 men under his direction in the course of their work and are original records (Rep. Tr. p. 206). The earliest map is a location profile map of 1873, certified to by the Chief Engineer and President of the Southern Pacific Railroad Company, and this map shows no highway or road at the present crossing of Los Feliz and the railroad (Rep. Tr. p. 209); although San Fernando Road can be located at its present location (Rep. Tr. p. 209). Exhibit 16 is an 1876 profile of the railroad in the area in question, and shows no Los Feliz, although it does show the railroad in place (Rep. Tr. p. 211-2, and Ex. 16).

It was stipulated that the Los Feliz road grade crossing was first established some time between 1887 and 1912, and has been used ever since it was established as a crossing by the public (Rep. Tr. p. 225-6).

Glendale in this area was formerly Tropico (Rep. Tr. p. 228); Tropico was first established as a station in 1887 (Rep. Tr. p. 231), and later became Glendale (Rep. Tr. p. 231). Los Feliz was originally Tropico Blvd. (Rep. Tr. p. 237).

The railroad commenced operation in 1873 or 1874 (Rep. Tr. p. 237-8).



*Harry R. Gernreich*, Superintendent of the Los Angeles Division of the Southern Pacific Company, a witness for Southern Pacific Company, testified that he was the chief operating officer of the Los Angeles Division; that the maximum length of trains operated is 100 cars; that because of length of sidings and yard tracks, it would be impossible to operate longer trains (Rep. Tr. p. 243-4); that the average length of a freight car is 50 feet (Rep. Tr. p. 245); that because of the volume of rail traffic trains cannot be stopped on the main line without tying up all operations (Rep. Tr. p. 244-5); that a separation of the grade crossing at Los Feliz would not be of any benefit to the railroad (Rep. Tr. p. 246-7 and 266), so far as switching and main-line movements are concerned (Rep. Tr. p. 247 and 266).

The crossing gates at Los Feliz are so arranged that no one can get caught between them (Ex. 19 and Rep. Tr. 249). As traffic approaches the crossing on its half of the street, there is a gate in front of the tracks, but there is no gate on the far side of the tracks (Rep. Tr. p. 249); so if a motorist gets by the gate protecting the tracks, and gets out on the tracks, there is nothing to prevent him from going through (Rep. Tr. p. 249). Likewise on the other half of the street for traffic coming in the opposite direction, there is a similar situation, and one cannot get locked between gates (Rep. Tr. p. 249-50, 257-8).

Passenger trains do not stop on Los Feliz (Rep. Tr. p. 250-2).

The coast and valley lines of the railroad operate over Los Feliz. The maximum number of cars up the coast line is 100 empties, empties and loads, or 75-80 cars with heavy

loads; while on the valley line the maximum number of cars is 86 (Rep. Tr. p. 253-4).

There are 10 to 12 trains a day of more than 90 cars that cross Los Feliz (Rep. Tr. p. 256).

The industries in the area in question prefer *night* switching, so that the plant switching will not interfere with their employees loading and unloading cars, and doing other work (Rep. Tr. p. 261). The amount of switching has been static, and about the same, for a number of years (Rep. Tr. p. 262). If Los Feliz were separated, there would be no savings to the company, in money paid to the switching crews (Rep. Tr. p. 266).

*Walker Paul*, Assistant to the Chief Engineer of Southern Pacific Company, recalled as a witness for Southern Pacific Company, testified (Nov. 1, 1951) concerning the critical situation of material (Rep. Tr. p. 269-273), and stated that the situation since the commencement of the hearings had become so nebulous, that he would hesitate to make a recommendation that work could even be started within a three-year period assuming, of course, that the defense program is continued at the same rate, or is accelerated (Rep. Tr. p. 272-3).

Exhibit 20 was introduced (Rep. Tr. p. 277 as a recapitulation of Exhibit No. 2 (Part V, page 28, reproduced in Appendix pages 86-91). This exhibit (20) shows the net annual benefits to the railroad as follows:

**BENEFITS TO PUBLIC AND RAILROAD THROUGH SEPARATION****(Recapitulation of Exhibit No. 2 (Page 28))**

Railroad operation cost (gatemmen, maintenance, etc.)	\$14,053	
Accident damages paid by RR	475	\$14,528
Depreciation on RR portion of structure	6,991	
Maintenance of same, excluding track	1,620	8,611
Net annual benefit to railroad		\$ 5,917
Above net savings capitalized at 5%		\$118,340

The witness further stated:

"The matter of participation by the railroad should be predicated on the benefits to the railroad, but being an annual charge, should be capitalized, or an annual credit, as it is in this instance. In discussing the capitalized benefits to the railroad, it is essential that we use a rate of return which would correspond to what it would cost our company by way of interest if it were to borrow money in the open market on a long term basis."

(Rep. Tr. p. 274, l. 18-25) The cost of money over a long-term basis to Southern Pacific Company is 5% (Rep. Tr. p. 275). The capitalized benefit to the Southern Pacific Company will be \$118,340 (Rep. Tr. p. 275), and is the maximum the Southern Pacific Company should be required to contribute (Rep. Tr. p. 275).

*J. C. Wright*, Assistant Trust Officer of the Farmers and Merchants National Bank of Los Angeles, a witness for Southern Pacific Company, stated his qualifications (Rep. Tr. p. 288-90) and that the cost of money over a long term on an unsecured basis to the Southern Pacific Company was 5% (Rep. Tr. p. 290). This was the cheapest form of money the Southern Pacific Company could obtain under the facts



of the case (Rep. Tr. pp. 293-300) for the purposes involved in this matter.

*Roger W. Jessup*, Chairman of the Board of Supervisors of Los Angeles County, appeared as a witness for the County of Los Angeles, and testified the County was anxious to do its share in helping out the cities and state in regard to the cost of the grade separations, but he did not know what the Board of Supervisors would contribute (Rep. Tr. p. 301). He further stated:

"I do feel that we could contribute a substantial amount, due to the fact that we gave to the Cities of Los Angeles County outside of this gasoline tax money, outside of the moneys given, based on a formula, which is each and every year, we gave them, last year, an extra \$1,750,000 or sixty thousand dollars. That was above that system, the moneys that we had given based on a formula basis. From that amount I would say that the Board would give quite a substantial amount towards this cost.

Q. How is that programed each year? Do you make a budget?

A. Yes.

Q. And you spell out how the money shall be spent?

A. That is right. We spell out to this extent, that we gave to the cities last year the moneys from the gasoline tax, their share, at least, I would say on this Formula 316, and then we had over that amount, we had \$1,750,000. That, of course, we just gave them, and although we did earmark moneys to be spent in certain projects, not very much but some.

—Q. Does the Board have that authority to assign this money, this gasoline money? A. Above that three-sixteenths. Well, we really have all of it. We have the authority to do all of it, but we do have a general

agreement that we contribute a certain amount un-earmarked, leave that up to the various cities."

(Rep. Tr. pp. 301-2)

*Walker Paul*, Assistant to the Chief Engineer of Southern Pacific Company, further recalled as a witness for Southern Pacific Company (Nov. 29, 1951); on cross-examination stated that the Bureau of Public Roads felt that unless a grade separation project is something absolutely vital to defense work, it should not be undertaken at this time (Rep. Tr. p. 309); that the average accident cost on Exhibit 20, of \$475 per year, was computed on the basis of the actual accident damages paid for the last 10 years (Rep. Tr. p. 313). The past experience at Los Feliz disclosed a very *limited number* of accidents (Rep. Tr. p. 314). The principal trouble at Los Feliz was the breaking of gates (Rep. Tr. p. 314). The trains in this area are operating at slow speed (Rep. Tr. pp. 315-6). The tower man at the gates has visibility, and will have no trouble with backlashes at the railroad (Rep. Tr. p. 316).

The proposed separation at Los Feliz will be of no benefit to the railroad patrons going to the Glendale station, for the vehicles will have to use a more circuitous route (Rep. Tr. p. 322); a considerable number of vehicles going to the Glendale station use Railroad Avenue, and Railroad Avenue will be cut off from the separation structure (Rep. Tr. p. 322).

*James J. Canty*, Road Foreman of Engines of the Los Angeles Division of the Southern Pacific Company, a witness for Southern Pacific Company, testified concerning his duties as supervising enginemen and that he had been

a fireman on a yard engine that worked over Los Feliz (Rep. Tr. p. 362), that he supervised the engine crews in connection with switching operation at Los Feliz (Rep. Tr. p. 408). He then outlined in detail each and every switching move made by an engine and yard crew across Los Feliz (Rep. Tr. pp. 409-13). A separation of grades at Los Feliz would not save the yard or switch crews any time or eliminate delays to the railroad (Rep. Tr. pp. 411 and 418). Accident or other delays would not increase the wages of the train crews who are paid on a complicated mileage and minimum number of hours basis (Rep. Tr. pp. 414-16 and 421). A separation of grades at Los Feliz would not reduce overtime payments (Rep. Tr. p. 424).

It is to be further noted that the attorney for the Department of Public Works, Division of Highways of the State of California stated as follows (Oct. 3, 1951):

"Your Honor, on behalf of the Department of Public Works of the State of California, I would like to have the record show that it is the position of the Department of Public Works, Division of Highways, that the proposed grade crossing structure would not be of any benefit to a state highway, would not be of any benefit to the nearest state highway, which is approximately 1000 feet from that grade crossing, being Route 4, also known as San Fernando Road. For those reasons, it is our position that the Commission would be without jurisdiction to impose any portion of the cost of building a grade separation structure on the Department of Public Works, Division of Highways, or to suggest that any portion of such funds be used to construct it." Commissioner Huls: "Your position is noted, Mr. Dolle. I will not rule on it at this time. I will reserve ruling probably until the time of decision." (Rep. Tr. pp. 4-5)



and (November 1, 1951):

Mr. Dolle: "Mr. Commissioner, I would like to have the record show this statement, first. At the beginning of this hearing the statement was made on behalf of the Department of Public Works, State of California, that it was our position that the Commission was without jurisdiction, in any event, to assess any portion of the costs of this proposed separation on Los Feliz Boulevard against the State of California, Department of Public Works, for several reasons, among them being the fact that it would be of no benefit to the State, and that the nearest state highway was approximately 1000 feet from the proposed crossing. With the understanding that we would not prejudice that position and we would maintain that position consistently, we would offer for the assistance of the Commission and for factual information only a traffic study and report made at San Fernando Road and Los Feliz Boulevard by the State of California Traffic Department."

Commissioner Huls: "Very well. We have noted your statement and reiteration of the previous statement. The Commission, of course, will ultimately have to determine the matter of jurisdiction, and whether your presentation is with or without prejudice to the statement you made we will have to determine. Of course, from the legal standpoint, it will not prejudice your right to urge that point." (Rep. Tr. pp. 146-7)

[fol. 129]

[File endorsement omitted]

## IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ANSWER OF THE PUBLIC UTILITIES COMMISSION OF THE STATE  
OF CALIFORNIA TO PETITION FOR WRIT OF REVIEW—Filed  
December 19, 1952

To the Honorable Phil S. Gibson, Chief Justice, and to the  
Honorable Associate Justices of the Supreme Court of  
the State of California:

The Public Utilities Commission herewith respectfully  
submits its answer to petition for writ of review herein.

## Preliminary Statement

Petitioner, hereinafter referred to as Southern Pacific, attacks Decisions Nos. 47420<sup>1</sup> and 47597,<sup>2</sup> of June 30 and [fol. 130] August 19, 1952, respectively, issued by this respondent Commission pursuant to Application No. 32385<sup>3</sup> of the City of Glendale for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Feliz Road and the main line railroad of said Southern Pacific, designating the portions of the work to be done, respectively, by said City of Glendale, the City of Los Angeles, and said railroad corporation, and allocating the costs thereof among said cities and said railroad corporation.

## P. U. C. Case No. 5327—Los Feliz Investigation and Study

Subsequent to the filing of the above numbered application on May 7, 1951, this Commission, on September 25, 1951, issued an Order of Investigation to determine whether or not, "in the interest of public safety, convenience and necessity," the grade separation should be constructed and also to determine "the proportions in which the expense of

<sup>1</sup> Ex. "C", Appendix to Petition.

<sup>2</sup> Ex. "E", Appendix to Petition.

<sup>3</sup> Also pursuant to P. U. C. Case No. 5327 (Exs. A and B, Appendix to Petition.

constructing and maintaining such a separation shall be divided among the Southern Pacific Company, the City of Los Angeles, the City of Glendale, the County of Los Angeles, the Department of Public Works, Division of Highways, of the State of California, or other political subdivisions affected. \* \* \* P. U. C. Exhibit No. 2 (presented by Commission and other witnesses) in these consolidated [fol. 131] proceedings being a detailed study of the Los Feliz grade separation situation, contains, amongst other matter, the results of an engineering study relative to effecting a grade separation between Southern Pacific Company's tracks and Los Feliz Boulevard, Cities of Los Angeles and Glendale. As stated, it is of composite composition, embracing, as it does, the combined co-operative efforts of the participants concerned.

Location: Los Feliz Road (Glendale)—Los Feliz Boulevard  
(Los Angeles)

At the aforementioned main line intersection with Southern Pacific, the tracks, consisting of two standard gauge main tracks, one standard gauge passing track and two standard gauge yard tracks, run in a northwesterly-southeasterly direction, while Los Feliz Road, designated as a road in Glendale and a boulevard in Los Angeles, runs in a northeasterly-southwesterly direction. The boundary line between the two cities parallels the tracks in the area of the intersection. Four of the above-mentioned tracks are in Glendale, and one, a spur track, is in Los Angeles. The grade crossing is designated as Crossing No. B-476.8, and the legal description of that portion in Glendale is as follows:

That portion of the right of way (100 feet wide) of the Southern Pacific described in deeds recorded in Book 14094, page 214, and in Book 17837, page 49, Official Records in the office of the Recorder of Los Angeles County, California.

[fol. 132] The legal description of that portion of the grade crossing in Los Angeles is as follows:

A strip of land having a uniform width of 30 feet, its northeasterly line being coincident and identical with



the southwesterly line of the Southern Pacific main line right of way (100 feet wide), said strip of land extending from the southeasterly line of Los Feliz (100 feet wide) to the northwesterly line of said Los Feliz.

#### House Resolution No. 24, California Legislature (1949)

By House Resolution No. 24 of the California Legislature, at its 1949 session, the Commission was directed to initiate proceedings with a view to obtaining grade separations at Los Feliz Boulevard, Glendale-Brand Boulevards, and Fletcher Drive. As a result of this resolution the President of the Public Utilities Commission transmitted a report to the Assembly, dated March 6, 1950, setting forth the results of an engineering study showing the estimated costs, economic justification, and problems of financing of the proposed grade separations.

#### Assembly Concurrent Resolution No. 88 of the 1951 Session

Subsequent to the foregoing Resolution and Commission Report, the State Legislature, by Assembly Concurrent Resolution No. 88 of the 1951 session, directed the Commission to hold hearings on the Los Feliz crossing, and the Commission's investigation (Case No. 5327) was instituted accordingly.

[fol. 133] Los Feliz Grade Separation Is Number One on the "Top-Priority" List of Los Angeles County Grade Crossing Committee

The instant record shows that not only has the Los Feliz crossing held "top priority" on the list of the Los Angeles Grade Crossing Committee since 1923, but that ensuing years have only emphasized this importance; that Los Feliz Boulevard meantime has reached its capacity and at the present time is carrying an overload, which situation has made it urgent to effect the grade separation. Also, that the stoppage of traffic at the railroad crossing at Los Feliz would cause a "backlash"<sup>4</sup> of traffic that would affect

<sup>4</sup> Backlash is the term used to describe the backing up of traffic from one intersection where it is stopped to block another intersection.

traffic on San Fernando Road. The distance between the railroad crossing and San Fernando Road is 820 feet, which distance is equivalent to a storage capacity of 38 cars in each of the three lanes of traffic. Checks have disclosed that there are times when more than 38 automobiles in each lane are held up due to a train blocking the crossing, and, as a result, the "backlash" of these automobiles congests San Fernando Road. This the proposed grade separation, of course, would also relieve.

### Alternate Plans for Proposed Grade Separation

The record carries detailed engineering plans and costs covering each of three proposed plans for the petitioned grade separation, two of which alternatives would be by [fol. 134] way of overpass as against underpass construction in connection with a gravity storm drain as the cheapest of the three plans and which latter was ultimately adopted by the Commission.

Because of the petitioner's asserted doubt as to monetary savings to the railroad, Commission staff studies set up annual estimates covering vehicular delay, railroad operating cost, gatemen, maintenance, accident damages paid by the railroad, the depreciation on the railroad portion of the structure, and maintenance thereof, excluding track, and reflecting net annual savings of some \$63,279.00 which savings, capitalized at 3%, 4% or 5%,<sup>5</sup> would produce \$2,109,000, \$1,582,000, \$1,266,000, respectively.

Nevertheless petitioner contended that the grade separation at Los Feliz crossing would be of no benefit to the railroad, and that there would be no saving to the company in money paid to employees, and accordingly estimated net railroad benefit at a mere \$5,917 annually. Similarly, petitioner reduced the engineering storm drainage estimate from \$249,100 to a sump and pump which it estimated at \$28,500, and which latter cheapest minimum was adopted for said drainage, the Commission finding that while the more elaborate gravity storm drain is desirable, yet it

---

<sup>5</sup> It should be noted that a bank official testified that the present cost to Southern Pacific of obtaining money on long-term basis is 5%.

would provide drainage for more than the structure area [fol. 135] and, accordingly, the entire cost of such a storm drain should not be included in any costs which are apportioned to the railroad, hence deducted \$220,600.00, or the difference between the two preceding sums, and used the petitioner's own calculations covering this very important structure, with construction cost allocations as hereinafter shown.

### Construction Cost Allocations for Los Feliz Grade Separation

Suffice it to state that after a full consideration of all of the evidence and with the benefit of briefs filed by the parties in the matter, the Commission found it to be in the interest of public safety, convenience and necessity to make the following cost allocations, as more specifically detailed in its findings, opinion and order, between the several parties involved, to-wit:

"Of the total cost of the proposed structure, as set out in the foregoing opinion which is estimated to be \$1,493,200, fifty per cent (50%) shall be borne by the Southern Pacific Company, twenty-five per cent (25%) by the County of Los Angeles, twelve and one-half per cent (12½%) by the City of Glendale, and twelve and one-half per cent (12½%) by the City of Los Angeles."

As shown in the Commission's decision, other necessary provisions respecting details of construction, the required time limitations for construction, and other appropriate regulations as between the several parties were fully provided therein.

[fol. 136] Despite Unprecedented Public Demands of the Police Power, the Petitioner, Southern Pacific, Refuses to Share in the Cost Allocations for Los Feliz Grade Separation (Even Though Itself a Direct Beneficiary Therefrom) and Requests the Court to Annul and Set Aside the Commission's Orders for the Protection of the Public Safety, Welfare, Convenience and Necessity Involved



The only deductions to be drawn from the petition and the conclusion therefrom is that petitioner has been intrigued by the novel and fallacious theory that regardless of the public safety and welfare, including convenience and necessity therefor, unless the railroad derives a readily calculable direct monetary benefit or financial gain from any Southern Pacific grade crossing separation, it will not share in the necessary expenses incidental to such grade separation or other highway improvement of the kind. Accordingly, notwithstanding "top-priority" demands for the Los Feliz grade separation from petitioner's main line five-track railway intersection, it denies the obvious advantages resultant to it and to the public in general and thereby hopes to escape its responsibilities and obligations as both the major rail common carrier and highway common carrier operating throughout the State of California. For it is both common knowledge and of official notice how petitioner, through its wholly owned truck and bus subsidiaries—Pacific Motor Trucking Company, Pacific Motor Transport and Pacific Electric Railway and Motor Transport system—ranks among the largest highway users in "bringing the rails to your door" and also probably the very largest in point of affiliated Greyhound bus operations [fol. 137] and Railway Express Agency motor express operations through its joint ownership and control of these two additional heavy patrons of the public highways throughout the State, and it is difficult, indeed, to reconcile such facts with petitioner's instant attempt at a blanket repudiation of any and all concern in the public highways of this State. This attempted maneuvering, therefore, whereby petitioner complains and alleges but at the same time flourishes as the largest rail, truck, bus, and express operator within the State, should, in view of blanket denials made in the petition, be kept constantly in mind when considering its evasive and fallacious arguments therein, and when weighing and evaluating the many direct and indirect benefits and advantages inevitably enjoyed by it, as we shall hereinafter explain.

Petitioner concedes that there is no issue as to whether Los Feliz main line grade separation should be built; it likewise concedes the elimination of vehicular delay upon this major traffic artery; but asserts that it cannot benefit

from these results. To quote petitioner: . . . "indeed, to the extent that competitive traffic (including that moving in private automobiles) using Los Feliz or other affected roadways is enabled by this improved facility to move faster or more cheaply, petitioner is damaged instead of benefited." And based on such a premise, it dismisses instant the entire subject of public safety, welfare, con-[fol. 138] venience and necessity involved, and proceeds to whittle away its proportional allocation to a paltry minimum, which latter it holds up to the Court as being "a contribution against will"—furthering the well-being of others—against which it asserts deprivation of due process and claims of confiscation.

It is submitted that the foregoing bares the fallacy of petitioner's allegations and contentions in attempted circumvention of prevailing regulatory controls clearly applicable to the instant situation but respecting which it suddenly renounces all responsibility in its unprecedented maneuvers to evade its statutory and constitutional obligations and liabilities under the exercise of the police power of the sovereign—the State of California.

#### Consolidated Hearings of Application No. 32385 and Public Utilities Commission Case No. 5327

With the concurrence of the parties, Commission consolidated hearings of both of the above formal proceedings ensued, with public hearings on October 3, and November 1 and 29, 1951, followed by their joint briefing and decision on the consolidated record thus made as of June 30, 1952.

The record reflects preceding traffic and engineering studies showing, among other things, the estimated cost, including property damage, economic justification, and the matter of financing. And although the instant proceedings [fol. 139] deal with separation of grades at Los Feliz, related freeways and major highway arteries necessary to a proper comprehension of Los Feliz Boulevard in its relation to the entire metropolitan and tributary areas of more than 170 square miles were reviewed.<sup>5</sup>

Owing to the extreme importance of Los Feliz and the

<sup>5</sup> Maps "C" and "D" of Exhibit No. 2.

state-wide consensus respecting the urgency for its grade separation, both Glendale and Los Angeles joined in appropriate resolutions against "maintaining a dangerous grade crossing" (Official Exhibits Nos. 1 to 8) and, considering the economic justifications for said separation, voluntarily committed their political units to such expenditures. Statewide interests participated in said hearings.

Amongst the major economic justifications are several already enumerated on page six herein. As shown in Exhibit No. 2, the so-called 10-year Freeway or master plan of highways, even if it were accomplished today, would have no beneficial effect in reducing traffic on Los Feliz Boulevard or upon the bottleneck<sup>6</sup> that exists at this Southern Pacific main line crossing. Growth in population, industrial expansion, and its gateway for recreational travel attest this fact. Los Feliz is an important traffic artery—a natural important route.<sup>7</sup> And today this highest priority project continues with still greater train, vehicular, and pedestrian movements aggravating the congestion, in-[fol. 140] creasing the delay and inconvenience to said traffic.

Additionally, it should be noted that the existing Los Feliz grade crossing is now protected by manually-operated crossing gates over the entire 24-hour period; that during the period January 1, 1926 to March 31, 1951, fourteen collisions between trains and automobiles have occurred, resulting in one death and nine injuries; that some 27,000 vehicles pass over said intersection in a 24-hour period, the gates being lowered about 70 times a day, i. e., 70 train movements daily; that the total vehicular delay for a 24-hour week day equals 4,500 vehicle minutes or 75 vehicle hours.

The combined engineering report (Ex. No. 2) states: "It is not possible to determine with any fine degree of accuracy the public benefits that might accrue from a grade separation at this location. . . ." No allowance has been made for "the loss of life or injuries resulting from accidents at this crossing, . . . income tax, or depreciation on retain-

<sup>6</sup> For traffic flows, Map "A".

<sup>7</sup> Maps "B" and "E".



ing walls, wing walls, or maintenance on the slopes." Certain items which do lend themselves to assigned monetary evaluation are as indicated on page 6 herein. For example, the hourly economic loss due to vehicular delay has been estimated at \$2 for automobiles, \$5.30 for trucks, and \$13.50 per hour for buses.

As will be appreciated, the Los Feliz crossing is quite near to petitioner's well known and widely patronized Glen [fol. 141] Dale passenger station. Singularly enough, however, petitioner disclaims any benefits from this latter in its blind adherence to the fallacious and illy conceived theory, irrespective of the public safety, welfare, convenience and necessity, that unless it [petitioner] derives a monetary gain or profit from the necessary grade separation of its crossings it will have nothing to do with defraying costs though they be invoked under the police power and in behalf of a statewide public interest, even though petitioner, directly or indirectly, becomes the true and ultimate beneficiary of such improvements.

*Public Utilities Commission Decisions Nos. 47420 and 47597  
Pursuant to Existing Statutory and Constitutional Mandates*

We now set forth the following excerpts from the statutory and constitutional mandates (embracing of powers conferred and duties prescribed) pursuant to which the Commission acted in both Case No. 537 and Application No. 32385, supra, in response to the public interest demands for relief from the dangerous Los Feliz grade crossing and the resultant allocations of costs as ultimately determined in the above orders.

The Public Utilities Commission has the exclusive power and duty to allocate costs of grade separations.

Article XII, Section 22, of the California Constitution provides, in part, that:

"No provision of this Constitution shall be construed [fol. 142] as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with

the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, Section 23, provides, in part:

"... The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

Pursuant to such constitutional provisions the Legislature enacted the Public Utilities Act, now incorporated in the Public Utilities Code. Section 1202 of the Public Utilities Code reads as follows:

"Section 1202. Exclusive Powers of the Commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established [fol. 143] lished.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be

made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

The California Public Utilities Commission, in its Decisions Nos. 47420 and 47597, which decisions petitioner is seeking to have reviewed, affirmed a previous holding of the Commission in Decision No. 47344 in which decision the Commission clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional cost of construction resulting from the presence of the tracks, the railroad's share would amount to about 86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U. S. 394, 65 L. ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430, 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121, 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24, 53 L. ed. 161.)



## CONFLICTING CONTENTIONS OF THE PARTIES

Notwithstanding all of the foregoing authority and directives pursuant to and in compliance with which the Commission acted, petitioner argues that the foregoing decisions are arbitrary, unreasonable and unconstitutional, and urges that no railroad grade separation costs whatsoever should be allocated to Southern Pacific unless and until demonstrated that it shall derive a specific monetary benefit or profit therefrom. Throughout this entire "profits" and "benefits" theory, of course, as interpreted by the petitioner, threads the assumption that its railroad has the right of way at a grade crossing, and that vehicular and pedestrian traffic must at all times yield to said railroad. As a matter of fact, there is no logical or legal basis for such contention that the costs of this grade separation should be borne by the parties respectively in accordance with the benefits to be received by them nor are any such benefits mathematically calculable as we shall hereinafter further enumerate and explain.

The cities of Glendale and Los Angeles have uniformly contended that the Railroad should be required to pay that [fol. 145] portion of the total cost which is attributable to the presence of the railroad tracks; that the proper basis of apportionment of the total costs is to assign to the Railroad the amount by which the presence of the railroad increases the cost of the necessary street improvement; and that the cost to the cities of maintaining and improving their city streets should not be increased by reason of the presence of railroads running upon or across them.

The Commission, as disclosed by the evidence adduced and its findings, opinion, conclusions and order, obviously considered, amongst other things, the factors surrounding the entire public interest affected, involving the public safety, welfare, convenience and necessity requiring such grade separation along with the railroad's creation or contribution to a situation wherein said public interests are adversely affected, hence fully justifying the instant orders by way of a proper exercise of the police power of the State.

Petitioner, in the course of its briefing herein, has not

only conceded ~~but~~ has vigorously contended that the solution of the instant situation has been committed by statutory and constitutional provisions to the Public Utilities Commission, citing in its support thereof the following, to-wit:

Sec. 22, Article XII, of the Constitution

Sec. 1202, Public Utilities Code (formerly Sec. 43(b) of the Public Utilities Act of 1915)

Sec. 1219, Public Utilities Code (being the 1933 addition of Sec. 43(d) of the Public Utilities Act of 1915), [fol. 146] and listing therewith the following cases:

*Sutizer v. Atchison, etc., Ry.* (1930), 164 Cal. App. 138, 154

*City of San Mateo v. Railroad Commission* (1937) 9 Cal. 2d 1, 7-9

*Northwestern Pac. R. R. Co. v. Superior Court* (1949) 34 Cal. 2d 454, 457-8.

Petitioner's specifications of error, therefore, simmer to its unsupported challenge of the weight of the evidence, asserted findings contrary thereto, and its allegations as to undue, unreasonable, and excessive burden of cost allocations as between the parties. Respecting these latter allegations, petitioner asserts that the Commission's order would require it to subsidize its competitors and injure its own business accordingly when, as a matter of fact, petitioner, being the largest highway user in this State through its wholly-owned motor trucking operations, its affiliated motor bus passenger business, and its jointly-owned railway truck express operations, stands in the position of the greatest potential beneficiary of all common carriers from any grade separations or other similar highway improvements where the factors of public safety, welfare, convenience and necessity in the public interest are involved.

For support of petitioner's astounding and unprecedented "about-face" in thus repudiating all prior performance in California grade separations of such priority concern, petitioner admittedly relies upon the single case of [fol. 147] *Nashville C. & St. L. R. Co. v. Walters*, 294 U. S. 404, the so-called *Nashville* case, for which there is neither precedent nor other foundation in the established law of

the land. Thus petitioner, in its bold venture in advocacy of the spurious "profits" and "benefits" theory, much resembles other familiar figures of "frenzied finance" who ask change for a dollar and a dollar for the change, realizing all too well that eventually someone may possibly make a mistake and it would not be petitioner. As a matter of fact, basically and fundamentally speaking, petitioner could have made no worse selection than the so-called *Nashville* case on which to stake its aforesaid "gamble" in attempted reversal and overthrow of the now firmly established grade separation law of the land.

This is necessarily so because of petitioner's misconception or utter ignoring of both the governing facts and the applicable law in a wholly different Los Feliz Boulevard situation, which will be explained in the ensuing pages.

*The So-Called "Nashville" case is wholly dissimilar both as to the governing facts and the applicable law from the instant Los Feliz grade separation case and, as hereinafter explained, the two basically and fundamentally different situations are in nowise comparable.*

At the outset it should be stated that the *Nashville* case is no authority for the inference or contention by petitioner that the law has now been changed so that railroads cannot [fol. 148] be required to pay the cost of grade crossing separations. In considering that case the following points should be noted:

1. The Tennessee statute there involved did not confer any discretion upon the Commission but, instead, it required the railroad in every case to pay one half the cost of a grade separation (79 L. ed. 949, at 954). Here, however, our statute gives to the Commission discretion to allocate the costs and does not purport to make an arbitrary assessment against the railroads.

2. In the *Nashville* case the railroad conceded "that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate." (P. 954—Emphasis added.) The claim of unconstitutionality in that case rests wholly upon the special facts shown. There-



fore, the issue as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in this proceeding was not even an issue in the Nashville case. The railroad conceded that in such a case it could be required to pay the entire cost!

3. The only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts. The Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead, it expressly stated that it was not making such a determination, which was in the first instance, for determination of allocation of costs by the Tennessee court (p. 965).

Included in evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

1. That the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

2. That the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power but, rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several States to make a nation-wide system of superhighways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

3. That the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, et cetera;

The State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Na-

tion;" "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce." The immediate interest of the Federal Government is, in part, the national defense, as well as the transportation of the mails;

[fol. 150] 5. The relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

6. Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

7. That the present facilities were deemed locally both safe and adequate was attested by the fact that neither the city authorities nor anyone else had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route was continued to be used for the local traffic;

8. The underpass was required for a new and additional highway over which State Highway No. 20 was being routed, which was to become a part of a Federal-aid route between Nashville and Memphis;

9. The underpass was prescribed, *not upon consideration of local safety needs*, but in conformity with general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass, and the payment of the Railway under the 1921 Tennessee Act of one-half the cost of separating the*

*grades were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass. (79 L. ed. pp. 956-961.)*

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and is no [fol. 151] authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing.

As was stated by the Supreme Court of the United States in the *Nashville* case (at p. 964):

" \* \* \* No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade separation involved in the instant proceeding. In the *Nashville* case we had a grade crossing in a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the im- [fol. 152] provement. No new route is being established. The existing grade crossing is being eliminated to remove a dangerous condition, such elimination being necessary in order that the street may safely handle local transportation needs.



In the *Nashville* case the Supreme Court of the United States expressly recognized the principle of law which we here urge. The court stated (at p. 964):

“It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost; *Chicago, B. & Q. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 954, 18 S. Ct. 513; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82; that a railroad has no constitutional immunity from having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; *Detroit, F. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; *Northern P. R. Co. v. Puget Sound & W.H.R. Co.*, 250 U. S. 332, 63 L. ed. 1013, 39 S. Ct. 474, and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 592, 52 L. ed. 630, 634, 28 S. Ct. 341; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; *Erie R. Co. v. Public Utility-Comrs.*, 254 U. S. 394, 409, 65 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required.”

[fol. 153] It should also be emphasized that the Supreme Court of the United States expressly stated in the *Nashville* case, at page 965:

“We have no occasion to consider now whether the facts presented by the Railway were of such persua-

siveness as to have required the State court to hold that the statute or order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not inquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deductible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases) \* \* \*

It is our considered opinion that the *Nashville* case, when properly analyzed, clearly supports the proposition that, in connection with a grade separation such as we are here considering, the railroad can be required to pay the entire cost of the improvement, or such lesser amount as this Commission may deem proper. As was stated by Mr. Chief Justice Hughes in *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, at page 674:

*"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways newly laid out, over their tracks, or to carry their tracks over such highways."* (Emphasis added.)

[fol. 154] *The Decisions of the Commission do not constitute an unlawful or other burden on interstate commerce*

We submit that petitioner's claim that the Commission's order burdens interstate commerce, in violation of the Commerce Clause or the National Transportation Policy is too remote and unrelated to the Los Feliz situation to call for reply herein. Even were such actually existent (which we do not concede) there is no showing of *undue* discrimination, which deficiency, of itself, conclusively refutes such

a claim. Furthermore, there is no claim nor can there be any valid showing that petitioner is not making highly profitable returns from its rail common carrier operations both within and without the State, or that the instant decision as to its Los Feliz crossing would render confiscatory the return of petitioner on its California operations. In view of these latter, it is elementary that the State may require the instant Los Feliz crossing service, said requirement raising no issue under the Federal Constitution. (*Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341, 347, 352-353, 95 L. ed. 1002, 1007, 1010; *Missouri Pacific Railway Co. v. Kansas*, 216 U. S. 262, 277-280, 54 L. ed. 472, 478-480; *Atlantic Coast Line R. Co. v. North Carolina*, 206 U. S. 1, 23-27, 51 L. ed. 933, 943-945; *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 308-309, 73 L. ed. 396). In these cases the Court has [fol.155] consistently followed the aforesaid rule.

Petitioner does not categorically assert that a State has no authority to burden or regulate interstate commerce, but it might be inferred that such contention is being made by petitioner from the propositions advanced by it. We call to this Court's attention the rule laid down by the Supreme Court of the United States that a State may lawfully burden interstate commerce and regulate it so long as State authority does not discriminate against such commerce. (*South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. 993, 998; *Railway Express Agency v. New York*, 336 U. S. 106, 111, 93 L. ed. 533, 539; *Kelly v. Washington*, 302 U. S. 1, 9-15, 82 L. ed. 3, 10-13; *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179, 186, 95 L. ed. 202.) Any doubt as to Federal superseding State must be resolved in favor of State authority. *Ark. R. R. Com. v. C. R. I. & P. R. Co.*, 274 U. S. 597, 603, 71 L. ed. 1224, 1228.

The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. *Washington ex rel Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of re-



view of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York v. United States*, 331 U. S. 284, [fol. 156] 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 576, 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)."

In attempted support of petitioner's contention ~~for trial~~ *de novo*, it has resorted to a rule heretofore announced in the *Ben Avon* case, *infra*, that a utility is entitled to a judicial determination of both the law and the facts in a regulatory proceeding.

While not of controlling importance so far as this proceeding is concerned, we wish to call to this Court's attention the fact that the Supreme Court has repudiated the rule which it announced in the case of *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289, 64 L. ed. 908, 914, with Justices Brandeis, Holmes, and Clark strongly dissenting. As lawyers are generally aware, that rule was of little practical value because courts were not inclined to try regulatory proceedings *de novo*. Particularly this Court, under the limited statutory review existing, could not retry a regulatory proceeding coming from the Commission because the statute requires the review to be determined solely upon the record of the Commission, the statute prohibiting this Court from taking additional evidence. Such a limited review by the courts is constitutional. (*Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341, 348-349, 95 L. ed. 1002, 1008.) Obviously, the rule that a utility is entitled to the determination by a Court on both the law [fol. 157] and the facts is rendered negative where judicial review is limited to the record made before the regulatory body. The philosophy and attitude of this Court was clearly and elaborately stated in the case of *Southern California Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, at pages 746-749, and comment thereon is unnecessary. Over the years the *Ben Avon* rule has been eroded and devitalized by the Courts themselves until the Supreme Court of the United States, in the cases of *Railroad Commission v. Rowan &*

*Nichols Oil Co.*, 310 U.S. 573, 581-582, 584, 84 L. ed. 1368, 1373, 1374; *Id.*, 311 U.S. 570, 85 L. ed. 358; *New York v. U.S.* 331 U.S. 284, 334-336, 91 L. ed. 1492, 1528-1530; *Alabama Pub. Serv. Commission v. Southern Ry. Co.*, 341 U.S. 341, 348, 349, 95 L. ed. 1002, 1008, finally rejected that rule, although the Ben Avon decision was not expressly overruled. A reading of these cases clearly demonstrates the repudiation of the rule. Following is the language of the Supreme Court on this point in the *Alabama Public Service Commission* case, *supra*:

"The fact that review in the Alabama Courts is limited to the record taken before the Commission presents no constitutional infirmity. *Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U.S. 510, 56 L. ed. 863, 32 S. Ct. 535 (1912). And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved. *New York v. United States*, 331 U.S. 284, 334-336, 91 L. ed. 1492, 1528-1530, 67 S. Ct. 1207 (1947); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 576, [fol. 158] 85 L. ed. 358, 362, 61 S. Ct. 343 (1941)." (*Alabama Public Service Commission, et al. v. Southern Railway Company*, 341 U.S. 341, 348-349, 95 L. ed. 1002, 1008.)

In view of the fact that the Supreme Court of the United States—the Court that prescribed the Ben Avon rule—no longer follows said rule, surely there is no reason why this Court should follow it. The fact that the Public Utilities Act was amended in 1933 in formal compliance with the Ben Avon rule could not perpetuate the rule in California after the father of the rule had disowned it.

*The Weight of Judicial Decision in the Great Majority of Cases Clearly Supports the Findings, Opinion, and Order of Respondent, Public Utilities Commission.*

In the absence of constitutional or valid statutory limitations, the State and its duly authorized political subdivisions have full power and authority, both at common law and under

the Federal Constitution, to require separation of grades at crossings of public streets and highways by railroads and to require the railroads to pay as much as the entire cost thereof and to repair and maintain the separation structures after their construction. This is a proper exercise of police power by or on behalf of the sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U.S. 394, 65 L. ed. 322, an order had been made by the Board of Public Utility Commissioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. [fol. 159] Fourteen of these crossings were required to be made by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the entire cost of all these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was unreasonable, arbitrary, and a violation of due process and interstate commerce clauses of the Federal constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U.S. 410, 65 L. ed. 333), said:

“Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generally the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to



the public, whatever may be the cost to the parties introducing the danger. This is one of the obvious cases of [fol. 160] the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitations that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. (Citing cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must necessarily comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

-In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U.S. 430, 58 L. ed. 671, the City of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two canals connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 100 feet wide which crossed the path of one of the proposed canals, and the city sought to condemn an [fol. 161] easement for this canal and its lateral walks across

this right of way. The railway tracks at the point in question were located on an artificial embankment 18 feet above the waterlevel of the lakes. It was agreed that the city should take the land and construct the canal and walks, and that the railway company should build the bridge according to plans prepared by the city, but the railway company reserved its right to recover damages or compensation in the condemnation action and claimed, in addition to the value of the land taken (which was paid), that it should be compensated for the entire cost of the necessary bridge across the canal and such further sum as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken, together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment, the Supreme Court of the United States, speaking through Mr. Justice Hughes, said (232 U.S. 437, 58 L. ed. 674):

"The question thus presented is whether the refusal to allow compensation for the cost of constructing and maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

*"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings; but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways . . ."* (Emphasis added.)

[fol. 162] Quoting from a Minnesota case, the court proceeds:

"A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the

same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed.' . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U.S. 121, 59 L. ed. 157, the city of Omaha by ordinance required the railroad to construct a viaduct over its line at its intersection with Dodge Street, together with approaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city engineer. The railroad [fol. 163] brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U.S. 127, 59 L. ed. 160):

"That a railroad company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. (Citing cases.)



"This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Comrs.* (1928), 278 U.S. 24, 73 L. ed. 161, the railroad sought to enjoin enforcement of an order made by the Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the *sole expense of the railway company in the amount of \$324,000*. In addition to raising the usual constitutional objections, the railroad claimed that an adequate crossing could be built for at least \$100,000 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal, the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U.S. 33, 73 L. ed. 166):

"This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one."

"It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost."

The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant.

. . . . .

[fol. 165] "A railroad company in maintaining a path of travel and transportation across a state with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits. (278 U. S. 34, 73 L. ed. 167.)

. . . . .

"The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act

to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear." (278 U. S. 35, 73 L. ed. 167.)

So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in [fol. 166] numerous cases where municipalities have by contract agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples *Chicago M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. ed. 671, and *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. ed. 630. In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. ed. 636):

"There can be no question as to the attitude of this court upon this question as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional prohibition against the impairment of the obligation of contracts. (Citing cases.) \* \* \* We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed."

In *State ex rel. Alton R. Co. v. Public Service Commission* (Mo. 1934), 70 S. W. 2d 57, 60, the Supreme Court of Missouri, in upholding an order of the Public Service Commission authorizing the widening of a concrete viaduct over a railroad, said:

[fol. 167] "The state has the right to build its other public highways, for travel by other means, over,



across, or under the railroad. To accommodate such travel, it has the right to build new roads across railroads at new places and provide for the necessary kind of crossing, or to widen existing roads and alter such crossings already established, as the public interest may in either case reasonably require. *If it did not, it would no longer be the sovereign.* To exercise its police power for the preservation of the public safety, this state has through the Legislature designated the Public Service Commission as the exclusive agency to determine and prescribe the manner and point of new crossings and to alter or abolish established crossings, apportion the expense, either of making new crossings or alterations of existing ones, and to provide for their maintenance.

“*Salus populi suprema lex est*” is the fundamental principle of the police power of the state, as well as our state motto. Private corporations, accorded the privilege of operating railroads, declared to be public highways of the state, for the purpose of private profit, must pay a reasonable proportion of the cost of improvements, which the presence of their tracks make or contribute to make necessary, for the welfare and safety of the people of the state. We therefore hold that the Public Service Commission has the authority not only to provide for a separation of a grade between a public highway and a railroad, when conditions make that necessary and proper, but that it also has the power, whenever the manner of crossing formerly prescribed by it becomes inadequate in width, height, or strength, to reasonably provide for the safety and welfare of the traveling public thereon, to order it reconstructed to meet their reasonable needs.” (Emphasis added.)

A review of the decisions of the respondent Public Utilities Commission and its predecessor Railroad Commission of California will show that throughout their history they have uniformly recognized the principle that [fol. 168] this State has the right and the power to impose upon a railroad all or any part of the cost of grade separations, including their alteration, relocation, or abolishment.

Petitioner has stated that the Commission has adopted the so-called benefit theory as a proper basis for the apportionment of costs, but the decisions cited by it do not support such contention.

The *Goshen Junction* case, 38 C. R. C. 380 (1933) involved a state highway to be paid in part with Federal-aid funds for highway construction, in the course of which the Commission took cognizance of the then existing depression and expressly gave consideration to "the economic situation, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past." Said facts are borne out by the respondent Commission Decision No. 25069 of August 15, 1932, reported in 37 C. R. C. 784, 786-787, as hereinbefore cited, and in which it specifically repudiated the so-called "benefits theory" of apportioning grade separation improvement costs in these words:

"The matter of direct financial benefits is not the sole test of the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as the benefits derived. *It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease.*" (Emphasis added.)

Other citations of the kind by petitioner appear so widely different, factually speaking, as not to require detailed analysis herein.

#### Decisions of the Public Utilities Commission Carry a Strong Presumption of Validity

It is respectfully submitted that this Honorable Court, in weighing petitioner's contentions of unconstitutionality, will keep ever in mind that the decisions assailed are sup-

ported by a strong presumption of validity. (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53, 80 L. ed. 1033, 1042; *Market St. Ry. Co. v. Railroad Commission*, 24 Cal. 2d 378, 399, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602, 88 L. ed. 333, 345; *San Francisco v. Industrial Accident Commission*, 183 Cal. 278.)

Decisions Nos. 4742 and 47597 of the Public Utilities Commission Have the Same Force and Effect as a Statute Enacted by the Legislature

The public Utilities Commission is a constitutional body to which has been delegated legislative authority, and its decisions in the execution of such legislative authority have [fol. 170] the same force and effect as a statute enacted by the Legislature. All the presumptions of validity which surround a statute enacted by the Legislature, based upon an exertion of the police power, support the decisions herein. The test of constitutionality applicable to a statute applies equally to the constitutionality of the decision involved herein. (*Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 185-186, 80 L. ed. 138, 146; *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 69, 81 L. ed. 510, 518; *Lewis v. Potomac Elec. Rr. Co.* (U. S. Ct. of Appeals, D. C.), 64 F. 2d 701, 702.)

The United States Supreme Court in the case of *Pacific States Box & Basket Co. v. White*, supra, 296 U. S. 176, 185-186, 80 L. ed. 138, 146, discussed the rule as follows:

" \* \* \* The order here in question deals with a subject clearly within the scope of the police power. See *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370; 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209, 79 L. ed. 281, 288, 55 S. Ct. 187.



"It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Ref. Co. v. Ryan*, 293 U. S. 388, 79 L. ed. 446, 55 S. Ct. 241, and *A. L. A. Schlechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570, 55 S. Ct. 837, 97 A. L. R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Ins. Co. v. Hyde*, 275 U. S. 440, 447, 72 L. ed. 357, 364, 48 S. Ct. 174."

#### This Court May Not Substitute Its Judgment for That of the Public Utilities Commission

Petitioner has cited numerous decisions from other jurisdictions calculated to create the inference, at least, that courts will substitute their judgment for the judgment of the regulatory body. Whether some States follow such a rule has no application here for the reason that the decisions of this Court and the plain provision of Sections 1756-1760 of the Public Utilities Code compel the conclusion that [fol. 172] this Court has no authority to substitute its judgment for the judgment of the Commission. (*Southern Cali-*

*California Edison Co. v. Railroad Commission*, 6 Cal. 2d 737, 746-749.)

Furthermore, the Supreme Court of the United States has held in an unbroken line of decisions that Courts must not substitute their judgment for that of regulatory bodies. (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 31, 80 L. ed. 1033, 1041; *Railroad Commission of Texas, et al. v. Rowan & Nichols Oil Co.*, 310 U. S. 573, 581, 582, 84 L. ed. 1368, 1373, 1374, pointing out that a Court must not substitute its judgment for that of the regulatory body even though the evidence is convincing that the judgment of the Court is better than the result arrived at by the regulatory body. (*Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570, 85 L. ed. 358; *National Labor Relations Board v. Link-Belt Co.*, 311 U. S. 584, 596-597, 85 L. ed. 368, 377-378.)

This rule is not altered or varied, even though the facts are not in dispute. Such a state of the record makes no difference. (*Gray v. Powell*, 314 U. S. 402, 412, 86 L. ed. 301, 310.)

Mr. Justice Holmes, speaking for the Supreme Court of the United States, stated the rule very succinctly as follows:

"It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." (Emphasis added.) (*San Diego Land [fol. 173] & Town Co. v. Jasper*, 189 U. S. 439, 441-442, 47 L. ed. 892, 894.)

### The Jurisdiction and the Authority of the Public Utilities Commission Is Plenary and Exclusive

We have already stated briefly supporting authority for Commission action and that by Article XII, Sections 17, 19, 20, 21, 22, 23, and 23a of the Constitution of the State of California, and the Public Utilities Act (Stats. 1915, Ch. 91, as amended—now Public Utilities Code) the Public Utilities Commission is given plenary and exclusive authority over public utilities in this State. (For Article XII, Secs. 22 and 23, see pages 13 and 14 hereof.) The equivalent provision is contained in Section 23a of said Article XII.

The Legislature may confer on the Commission any and all authority it possesses over public utilities and, in addition, it may confer powers upon the Commission that the Legislature itself could not exercise because of constitutional restriction imposed directly upon the Legislature. The only restraint imposed upon the Legislature in conferring powers upon the Commission pursuant to said Article XII is that afforded by the Federal Constitution.

The foregoing constitutional provisions and the Public Utilities Act have received interpretation at the hands of this Court, and the plenary authority conferred thereby on [fol. 174] this Commission has been broadly upheld. (*Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 650, 689; *Clemmons v. Railroad Commission*, 173 Cal. 254, 258; *City of San Jose v. Railroad Commission*, 175 Cal. 284, 290; *Miller v. Railroad Commission*, 9 Cal. 2d 190, 195, 198; *Sale v. Railroad Commission*, 15 Cal. 2d 612, 617.)

In *Sale v. Railroad Commission*, *supra*, this Court stated at pages 617 and 618 as follows:

“ \* \* \* A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.

“The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. (Cal. Const., art. XII, secs. 22, 23.) The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. (See *Public Utilities Act*, *supra*, passim; 15 Cal. L. Rev. 445.) All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. ‘No



informality . . . shall invalidate any order, decision, rule or regulation made . . . ' (Public Utilities Act, *supra*, sec. 53.) Hence, unless the act required the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order." (Emphasis added.)

[fol. 175] **The Constitutionality of a Statute Will Only Be Passed Upon Where Absolutely Necessary**

It is a well established general rule that the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned. Such determination must be absolutely necessary in order to determine the merits of the case in which the constitutionality of the statute has been drawn into question. This is such a basic and well established rule of this Court and of the United States Supreme Court that but a few of the leading decisions are cited herein: *State of Texas v. Interstate Commerce Commission*, 258 U. S. 158, 66 L. ed. 531; *Arkansas Fuel Oil Co. v. State of Louisiana*, 304 U. S. 197, 82 L. ed. 1287; *Franklin v. Peterson*, 87 C.A. 2d 727, 730; *Great Western Power Co. v. City of Oakland*, 189 Cal. 649; *In re Herman*, 183, Cal. 153, 160, 16 Corpus Juris Secundum 207, Sec. 94.

*Petitioner, Through Its Wholly Owned Pacific Motor Trucking Company—Pacific Motor Transport, and Its Subsidiaries, Pacific Electric Railway System, Railway Express Agency, Inc., and Others, Operates and/or Controls the Largest and Most Extensive Common Carrier Railroad-motor Truck-passenger Bus Stage-express and Related Services in the State of California, in the Course of Its Extension of Operations to the Customers' Doorway, Hence Has Greater Concern in the Public Highways of This State Than Any Other Carrier of the Entire Industry*

One of the complaints of petitioner, Southern Pacific, is [fol. 176] this Honorable Court is that the Public Utilities

Commission, in its orders (Decisions Nos. 47420 and 47597) directing the grade separation at its Los Feliz crossing, is somehow forcing it to subsidize its competitors (p. 52 of Petition), owing to the increased highway usage by the motor vehicle industry of California and, as an attempted justification therefor, we quote petitioner:

"The evidence shows that greater freedom of movement of highway traffic—that is, elimination of vehicular delay upon a major traffic artery—will result from the separation, and is the real and only purpose thereof. Petitioner cannot benefit in any way from this result; indeed, to the extent that competitive traffic (including that moving in private automobiles) using Los Feliz or other affected roadways is enabled by this improved facility to move faster or more cheaply, petitioner is damaged instead of benefited."

Strange logic, indeed, to come from one of the most extensive and intensive highway users throughout the entire State!

We reiterate that this petitioner's contention for a "monetary-profits-or-nothing" participation in necessary grade separations at its vital rail-highway intersections is preposterous: For example, blinded by its unreasonable demands for instantaneous mathematical calculable monetary profits and benefits, petitioner has flatly refused to give consideration to numerous of the obvious benefits and advantages that inevitably accrue from the widely-petitioned grade separation at the dangerous Los Feliz crossing, to-wit:

[fol. 177 1. Increasing possibility of accidents due to backlash in the railroad tracks (Tr. p. 316—loss and damage claims);

2. Savings resulting from relief from crossing gates, including certain switching operations (Tr. p. 317);

3. Improved drainage of right of way in vicinity of Los Feliz and reduction of flood conditions at depot grounds;

4. Greater accessibility of railroad depot to patrons coming from the Hollywood area to the Glendale Station of petitioner;

5. Elimination of delay to railroad through elimination of crossing accidents, loss of life, and personal injury suits;

6. Elimination of the possibility of serious damage to railroad equipment by elimination of accidents—the type of accident which could occur but which has not yet occurred at Los Feliz (Tr. p. 347);

7. Increased length of trains over the present 90 to 100 cars;

8. Greater freedom, if not profits, in all switching operations;

9. Opportunity for temporary storage of trains up to 90 cars in length;

10. Advantages of new structures and consequent longer life periods;

11. Benefits from streets as “feeders” for this petitioner;

12. Benefits from improved good will which, though conceded to be important, admittedly is difficult of precise monetary evaluation.

And, by way of contrast to petitioner's attitude, we have undertaken to explain to the Court this Commission's uniform practice, in apportioning cost allocations between applicants and the railroads, of giving in all instances due consideration to the obligations of each of the parties, to-[fol. 178] gether with the benefits and advantages to be derived by such parties.

For, as heretofore stated by the Commission, it should be recognized that the railroad has a continuing obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separate grades. We wish to emphasize that this obligation is inherent. (*City of Oakland v. Schenck*, 197 Cal. 456; 241 P. 545.)

*Petitioner, in Its “Briefing for Volume” Rather Than Logic, Has Gone Completely Outside the Instant Record and Otherwise Violated the Governing Rules and Ethics Involved*

The instant issues are indeed simple, but petitioner has injected extraneous matters to lend complexity and confuse the record. In doing so it has gone far afield in utter disregard of the record herein and resorted to borrowing



outside rail and propaganda in a frantic effort to bolster its untenable position herein.

For example, on pages 34 and 74 of the petition, reference is made to a study prepared by the Stanford Research Institute. No such study was in evidence herein. Likewise, on page 36 reference is made to a General Administrative Memorandum No. 325 issued by the United States Bureau of Public Roads, a document which, also, was not in evidence in these proceedings.

[fol. 179] On page 37, the petition reads:

"It is suggested that the Commission made its findings in the face of this positive testimony, in order to avoid any possibility that the State Department of Public Works might be called upon to contribute; since in that event, Federal funds being potentially involved, the contribution to the railroad might have to be limited to 10 per cent of the allocable cost."

We submit, Your Honors, that the inference in such language is wholly improper, to say the least, and merits the rightful indignation of the Public Utilities Commission.

Again, the petition refers to the history of accidents at the crossing in question and, by noting the relatively few accidents over the last 25 years, implies that the crossing, as such, is not potentially dangerous. This we regard as an improper implication.

And again, the petition suggests that the Commission is somehow inconsistent in adopting the "continuing obligation" theory while at the same time recognizing a "safety" aspect. In answer to this, we respectfully reaffirm that there is no inconsistency in such approach.

Finally, these aforesaid and kindred departures and violations are flagrantly repeated in pages 34 to 37, 65 to 70, and 74 to 82, inclusive, of the instant petition, only to be followed by more of the same (being nowhere in evidence in the official transcript of record) in pages 63 to 71, inclusive, and 98 and 99 of the ensuing appendix to the said petition. [fol. 180] Accordingly, we must ask that this Honorable Court refuse to consider any and all of the above unauthorized data and that it take such further action respecting the

indicated violations of established procedural rules and ethical standards as it deems appropriate.

### *Summary*

Summarized, it is conceded that the instant grade separation is entirely practicable of construction as ordered and we believe the record conclusively establishes the overburdened and hazardous character of the Los Felix crossing which has already reached its capacity and, as disclosed by various recent checks, continues with still greater train, vehicular, and pedestrian movements (Exs. Nos. 1 to 9) aggravating the congestion, increasing the delays, and otherwise inconveniencing the general public.

That due to its long-standing "top-priority" status, statewide attention has focused upon Los Felix in the public's demand for relief. That while the underpass (the cheapest of the three alternative plans studied) was finally adopted herein, under the governing law it is immaterial whether the crossing is at grade or below or above the tracks. (*Cincinnati etc. R. Co. v. Connersville*, 218 U.S. 336, 54 L. ed. 1060; *Mo. P. R. Co. v. Omaha*, 235 U.S. 121, 59 L. ed. 157.) [fol. 181] That the over-all practicalities of the agreed underpass are unquestioned; its construction cost not in issue, the only controversy being as to specific cost allocations as between the several parties with their differing formulae, all of which have been resolved through public hearings and evidence thus adduced.

That pursuant to existing constitutional and statutory mandates (the powers conferred and the duties therein prescribed) the Public Utilities Commission has, in keeping with legislative directives, invoked the police power of the State on behalf of the public interest in promotion of the public safety, welfare, convenience and necessity here involved. In so doing, it has acted pursuant to and in accordance with its said powers and duties, and pursuant to and in full accordance with the applicable provisions of law.

That the Public Utilities Commission has the specific duties of investigation and determination as to the Los Felix crossing and the exclusive power and authority to allocate costs of such grade separations, and that its findings, opinion, conclusions and orders herein assailed by Southern Pa.

cise are in strict accord with the decisions and procedure of this Court. The aforementioned constitutional and statutory provisions have received interpretation at the hands of this Court, and the plenary authority conferred thereby has been broadly upheld.

That said prevailing State and Federal law for the effecting of grade crossing separations under the invocation of the police power of this State through the agency of the Public Utilities Commission has not changed, as petitioner has erroneously asserted, but, on the contrary, the great weight of judicial decision fully supports the character and the extent of the determination as herein made.

That petitioner has rested its opposing contentions on but a single case—the *Nashville* case—which, as already shown herein, is wholly dissimilar both as to the governing facts and the applicable law, hence affords no parallel to the instant Los Feliz situation, since in the former case [Nashville] the two separate highways and the two widely separated crossings there involved, being a quarter of a mile or more apart) are separately operated today, just as heretofore.

That as regards legislative or other "trends" urged by petitioner (including the inapplicable so-called Federal Aid Highway Act), we quote our co-respondents herein, the cities of Los Angeles and Glendale, as follows:

"Petitioner has argued that the trend nationally is toward allocating costs of grade separation on the basis of benefits. It would probably be more accurate to say that in recent years the railroads have successfully secured passage of legislation by more and more states relieving them of their legal obligation to provide grade crossings." (Respondents Joint Brief, pp. 35-40, at p. 40.)

That the leading cases prior to, during, and since the [fol. 183] so-called "*Nashville*" case support the controlling principles of law whereby a railroad company takes its charter subject to the power of the State to provide for the safety of the public, and tracks of the railroad are laid subject to the condition, necessarily implied, that their use could be so regulated by competent authority as to ensure said public safety, welfare, convenience and necessity.



Also, that such railroad, when thus accepting privileges and franchises granted in its charter, must be deemed to have taken into account expenses which might thereafter be incurred by reason of an order of the Public Utilities Commission compelling the necessary installations for its safe operation at public highway crossings. (*Pennsylvania-Reading Seashore Lines v. Board of Public Utility Commissioners, Department of Public Utilities, et al.* (1951), 81 A (2d) 28, 33; affirmed in 82 A (2d) 774.)

That petitioner is highly inconsistent in disclaiming numerous benefits and advantages which, as hereinbefore enumerated, inevitably would accrue to it and to its highway-carrier subsidiaries from the Los Feliz improvement.

That one of the obvious purposes of petitioner's attack upon the existing laws and the Constitution of California, including the Commission's order, is to so "stymie", through prolonged and futile negotiations, any and all future grade separation relief and thereby escape any monetary or other payments whatsoever.

[fol. 184]

#### Conclusion

Mindful of the history of Commission grade separation procedures, it is doubly apparent that petitioner's rail profits theory here urged upon this Court would be a perversion of grade crossing regulation as it exists in California and would make the present constitutional and statutory provisions for the protection of the public interest under the exercise of the police powers of the State nothing but a sham and a delusion.

Procedurally speaking, the instant situation as urged by petitioner is well characterized by this Court in the case of *American Toll Bridge Co. v. Railroad Commission*, 12 C. 2d 184, 207:

"... Nothing appears which justifies a conclusion that all the essentials of a full and fair hearing before the Railroad Commission [Public Utilities Commission] were not accorded the petitioner in compliance with the requirements of the constitutional mandate."

"... We conclude that the procedure followed in the present matter has not infringed upon the rights of

the petitioner vouchsafed to it by the state and federal constitutions."

And in *Southern California Edison Co. v. Railroad Commission*, 6 C. 2d 737, 748, the Court, in denying such a rehearing as here sought by petitioner, commented as follows:

"There is another field of extensive scope in which the respondent commission exercises its powers and wherein the action of the commission is brought into [fol. 185] question before this court. In this field are the executive and administrative orders of the commission in connection with which the commission exercises a wide discretionary power, such as in the granting, withholding and canceling of permits and countless other orders of regulation and control. Within this classification it quite often happens that the complaining party seeks redress in this court on alleged federal constitutional grounds, when in fact there is no such question substantially involved. In such cases it may not be successfully contended that this court, on a review proceeding involving the action of the commission, should be a trier of disputed questions of fact, already resolved by the commission."

Surely, no public utility has a right to relitigate in the courts, on the ground that constitutional rights are involved, factual questions such as herein determined by the Public Utilities Commission.

The very recent decision of the Supreme Court of the State of California in the related case of the Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission of the State of California and City of Los Angeles, S. F. No. 18671, decided December 11, 1952, would appear to dispose of the issues herein.

Since the preparation of this answering brief, this Honorable Court, on December 11, 1952, in S.F. No. 18671 (*The Atchison, Topeka and Santa Fe Railway Company v. The Public Utilities Commission of the State of California and City of Los Angeles*), denied a petition for a writ of review [fols. 186-192] which decision, we believe, also disposes of

the issues in the instant proceeding since, as will be noted on page 15 of this answering brief, the Commission affirmed in said instant Decisions Nos. 47420 and 47597 herein its previous holding in Decision No. 47344 involved in S.F. No. 18671 (*The A.T. & S.F.R. Co. v. P.U. Com., et al.*—the Washington Boulevard case, *supra.*)

Considering the fact that the said petitions in each case stress factual similarity with like citations in support of identical contentions, neither petitioner can therefore consistently urge any different ruling herein by the Supreme Court.

Petitioner's mere inference that Decision No. 47420 is unlawful because of its provision that "the effective date of this order shall be twenty (20) days after the date hereof," when no injury to any party is either claimed or shown, is of no significance herein. (*Re Bray on Habeas Corpus*, 125 Cal. App. 363; *Clemmons v. Railroad Commission*, 173 Cal. 254.)

Manifestly, the instant petition lacks merit and, for each of the reasons hereinbefore explained, we respectfully urge that said petition be denied.

Respectfully submitted, (S.) Everett C. McKeage,  
Hal. F. Wiggins, Attorneys for Public Utilities  
Commission of the State of California.

Dated: San Francisco, California, December 16, 1952.

[fol. 193]            [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ANSWER AND BRIEF OF THE CITY OF LOS ANGELES AND THE  
CITY OF GLENDALE, REAL PARTIES IN INTEREST, IN OPPOSITION  
TO ISSUANCE OF WRIT OF REVIEW—Filed October 8,  
1952

*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the State of California:*

Pursuant to Rule 58(b) of the Rules on Appeal, the City  
of Los Angeles and the City of Glendale, real parties in



interest in the above-entitled matter, hereby file their answer and brief in opposition to the issuance of writ of review in this cause.

### Answer

The City of Los Angeles, a municipal corporation, and the City of Glendale, a municipal corporation, real parties in interest, answering petitioner's Petition for Writ of Review, admit, deny and allege as follows:

### I

Answering paragraph IV, these real parties in interest deny that the Commission failed to regularly pursue its lawful authority, or that it acted in excess of its jurisdiction, or that it wrongfully deprived petitioner of rights or property without due process of law, or that it has denied [fol. 194] the petitioner the equal protection of the laws in violation of the Constitution of the United States or of this State, or that it has taken action which results in undue burdens upon interstate commerce.

Further answering said paragraph, these real parties in interest allege that in all particulars and at all times the Commission acted pursuant to and in accordance with its powers and duties, and pursuant to and in accordance with applicable provisions of law.

Further answering said paragraph, which contains conclusions of law, argument, opinion, and assumptions of ultimate facts, these real parties in interest incorporate by reference the matters set forth in their brief.

Wherefore, these real parties in interest respectfully pray:

1. That no writ of review be issued by this Honorable Court in this proceeding.
2. For their costs herein.
3. For such other and further relief as may be proper and just in the premises.

Ray L. Chesebro, City Attorney; Bourke Jones, Assistant City Attorney; Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Real Party in Interest. Henry Mc-

Clerman, City Attorney; John H. Lauten, Assistant City Attorney, Attorneys for the City of Glendale, a Real Party in Interest.

[fol. 195] BRIEF IN OPPOSITION TO ISSUANCE OF WRIT OF  
REVIEW

Statement of Case

On May 7, 1951, the City of Glendale filed an application, numbered 32385, with the Public Utilities Commission of the State of California for an order authorizing and requiring the construction of a grade separation of the crossing of Los-Feliz Road and the railroad of the Southern Pacific Company, designating the portions of the work to be done respectively by said City of Glendale, the City of Los Angeles, and said railroad corporation, and allocating the cost thereof among said cities and said railroad corporation.

On September 25, 1951, the Commission, on its own motion, instituted an investigation, Case No. 5327, as to the [fol. 196] necessity of effecting the same grade separation and the division of cost among the Cities of Los Angeles and Glendale, the County of Los Angeles and the Department of Public Works, Division of Highways, State of California.

The City of Glendale's application and the Commission's investigation were consolidated for the purpose of hearing and consideration. After public hearings were held on October 3, November 1 and November 29, 1951, the Commission under date of June 30, 1952, issued its Decision No. 43374 authorizing the construction of a grade separation and allocating the total estimated cost of \$1,493,200; 50% to the Southern Pacific Company, 25% to the County of Los Angeles, and 12½% each to the Cities of Los Angeles and Glendale.

On July 9, 1952, the Southern Pacific Company petitioned for rehearing. On August 19, 1952, the Commission rendered its Decision No. 47597 denying the petition.

### Basic Contentions of Parties

Throughout the proceedings, the Cities of Los Angeles and Glendale have contended that the Railroad should be required to pay that portion of the total cost which is attributable to the presence of the railroad tracks; that the proper basis of apportionment of the total costs is to assign to the Railroad the amount by which the presence of the railroad increases the cost of the necessary street improvement; and that the cost to the Cities of maintain-[fol. 197] ing and improving their city streets should not be increased by reason of the presence of railroads running upon, or across them.

The Railroad has contended that costs should be allocated according to benefits received by it and that the only benefits derived by it are from reduced accident damages payable by the Railroad and reduced operating costs brought about by elimination of gatemen and crossing maintenance costs. The Railroad has contended that the evidence does not disclose that the public safety requires the proposed separation, or that the railroad has created or contributed to a situation wherein the convenience and necessity of the public are adversely affected, and therefore the orders of the Commission constitute an improper use of the police power. On the other hand, the Cities contend that the evidence before the Commission clearly shows that public safety requires the grade separation and that the railroad has created or contributed to a situation wherein the convenience and necessity of the public are adversely affected, thus justifying the Commission's orders as a proper exercise of the police power.

### Evidence

The evidence as summarized by petitioner in its brief is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized.

In 1923, when the movement for a grade separation was first started, the traffic on Los Feliz was 16,000 vehicles per day at the grade crossing. [Ex. 2, p. 4.] Traffic counts [fol. 198] conducted in 1951 indicated that the traffic load had increased to approximately 27,000 vehicles per day. [Ex. 2, p. 4.] Of the total number of vehicles passing over



the grade crossing, only a very small percentage were trucks and those trucks were engaged principally in local transportation. [Tr. 28, 126.] The buses which used the street were substantially all engaged in local transportation. [Tr. 125.] There was no evidence that vehicles using the street were in competition with the railroad, while there was evidence to the effect that many vehicles using the street were providing business for the railroad. [Tr. 66.] Testimony presented indicated that the public probably would continue to make increasing use of Los Feliz in the future despite construction of freeways in the metropolitan area. [Tr. 185.] Los Feliz is an important traffic artery connecting the Hollywood and West Los Angeles areas with the Glendale, La Crescenta Valley, Pasadena and San Gabriel Valley areas. [Ex. 2, p. 3.]

The present 70 to 76-foot roadway of Los Feliz is being used to approximately 50% of its designed capacity due to obstructions. [Tr. 182, 186, 193.] A point of congestion on Los Feliz at its intersection with Riverside Drive [Tr. 82, 92] will be eliminated with the construction of the Riverside Parkway. [Tr. 113.] Upon removal of other obstructions, by widening Franklin and Western Avenues which connect to Los Feliz and elimination of the grade crossing, use of Los Feliz by motor vehicles will increase. [Tr. 196.] [Vol. 199] The number of train movements has materially increased in the last fifteen years [Tr. 71, 107; Ex. 4] and *the length of freight trains has been drastically increased during the lives of some of the Railroad's personnel.* [Tr. 256.] All passenger trains are either just starting or slowing almost to a halt while passing the Los Feliz grade crossing. [Tr. 67.] Freight trains also operate at reduced speed because they are either slowing up as they approach the Los Angeles yards, or they are picking up speed as a result of leaving the yards. [Tr. 67.] With the present volume of traffic, backlash\* occurs during peak hours as a result of train movements. The backlash occurs both at San Fernando Road when the train is crossing and upon the

---

\* Backlash is the term used to describe the backing up of traffic from one intersection where it is stopped to block another intersection. [Tr. 179.]

railroad tracks when east-bound traffic, released after a train movement, is stopped at the intersection of San Fernando Road. [Tr. 188, 189, 190, 191.] In the future when traffic volumes increase on Los Feliz, such backlash will become a common occurrence. [Tr. 197.]

[fol. 200]

## ARGUMENT

### Point I

#### The Public Utilities Commission Has the Exclusive Power and Duty to Allocate Costs of Grade Separations

Article XII, Section 22, of the California Constitution provides, in part, that:

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

Article XII, Section 23, provides, in part:

"\* \* \* The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution.

[fol. 201] Pursuant to such constitutional provisions the Legislature enacted the Public Utilities Act, now incorpor-

ated in the Public Utilities Code. Section 1202 of the Public Utilities Code reads as follows:

"Section 1202. Exclusive powers of commission. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city, or other political subdivision affected."

[fol. 202] The California Public Utilities Commission, in its Decision No. 47420, which decision petitioner is seeking to have reviewed, affirmed a previous holding of the Commission in Decision No. 47344, in which decision the Commission clearly set forth the law when it stated:

"There is no statutory requirement that this Commission follow any particular theory of allocation of costs. Under the theory advanced by the City of Los Angeles that the railroad should pay the additional cost of construction resulting from the presence of the tracks, the railroad's share would amount to about



86 per cent of the total costs. Under the theory advanced by the railroad that it should pay only according to the benefits it receives, and considering its contention that it receives no benefits, its contribution would be nothing.

"The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, *supra*, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company v. Board of Public Utility Commissioners*, 1920, 254 U. S. 394; 65 L. Ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company v. Minneapolis*, 1914, 232 U. S. 430; 58 L. ed. 671; *Missouri Pacific Railway Company v. Omaha*, 1914, 235 U. S. 121; 59 L. ed. 157; *Lehigh Valley Railroad Company v. Board of Public Utility Commissioners*, 1928, 278 U. S. 24; 73 L. ed. 161.)"

[fol. 203]

## Point II

In the Absence of Constitutional or Valid Statutory Limitations, the State and Its Duly Authorized Political Subdivisions Have Full Power and Authority, Both at Common Law and Under the Federal Constitution, to Require Separation of Grades at Crossings of Public Streets and Highways by Railroads and to Require the Railroads to Pay as Much as the Entire Cost Thereof and to Repair and Maintain the Separation Structures After Their Construction. This is a Proper Exercise of Police Power by or on Behalf of the Sovereign.

In the case of *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U. S. 394, 65 L. Ed. 322, an order had been made by the Board of Public Utility Commissioners of New Jersey requiring the Erie Railroad to install grade separations at fifteen street crossings in the city of Paterson. Fourteen of these crossings were required to be made

by means of underpassed streets and the fifteenth by means of a viaduct carrying the street over the railroad. The order required the railroad company to pay the *entire* cost of *all* of these separations, with the exception that 10% of the cost was required to be borne by a streetcar company which occupied three of the crossings. Most of the streets involved were laid out later than the railroad tracks. The railroad company insisted that compliance with the order would result in its bankruptcy and attacked the order on the grounds that it was unreasonable, arbitrary and a violation of the due process and interstate commerce clauses of the federal [fol. 204] constitution. In affirming the order the Supreme Court of the United States, speaking through Mr. Justice Holmes (254 U. S. 410, 65 L. Ed. 323), said:

"Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their con-

stitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of [fol. 205] the soil. (Citing cases.) To engage in interstate commerce the railroad must get on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. (Citing cases.) If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. (Citing cases.) Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous."

In *Cincinnati I. & W. R. Co. v. Connersville* (1910), 218 U. S. 336, 54 L. Ed. 1060, the railroad maintained an embankment across Grand Avenue in the City of Connersville, Indiana, and thereby blocked passage between the northerly and southerly parts of the street. The city council adopted a resolution that said avenue should, as a matter of public necessity, be opened as a public street through the railroad embankment and proceeded to condemn a street easement through the embankment for the full width of the avenue. At a trial by jury compensation was awarded to the railroad only for the land thus condemned. The trial court instructed the jury that it was the duty of the defendant railroad company to construct and keep in safe condition all highway crossings and that the railroad would not be entitled to any damages for constructing the necessary crossing or abutments and bridge for supporting its railroad over and across the street when constructed. The trial court refused to instruct the jury that in considering the [fol. 206] railroad's damages it should take into account the cost to the railroad of constructing a bridge to carry its railroad over the proposed street. No award was made for the cost of such bridge, etc. Thus the city bore the expense



of the construction of the street and the railroad was required to install the necessary bridge to carry its tracks. The judgment was affirmed by the Supreme Court of Indiana and upon appeal to the Supreme Court of the United States was again affirmed. On such appeals the railroad company contended that the police power of the state cannot be so applied as to require the railroad company to build the bridge without compensation. In affirming the judgment, the Supreme Court of the United States, speaking through Mr. Justice Harlan, said (218 U. S. 343, 54 L. Ed. 1064):

"If the railway company was not entitled to compensation on account of the construction of this bridge—whether regard be had to the 5th or the 14th Amendments of the Constitution, or to the general reserved police power of the state—then it is clear that the jury were not misdirected as to what should be considered by them in estimating the damages which, under the law, the railway company was entitled to recover.

"The question as to the right of the railway company to be reimbursed for any moneys necessarily expended in constructing the bridge in question is, we think, concluded by former decisions of this court; particularly by *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 562, 582, 584, 591, 50 L. Ed. 601, 605, 606, 608, 26 Sup. Ct. 341, 4 A. & E. Ann. Cas. 1175; *New Orleans Gas Light Co. v. Drainage Comrs.*, 197 U. S. 453, 49 L. Ed. 831, 25 Sup. Ct. Rep. 471; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 571, 38 L. Ed. 269, 274, 14 Sup. Ct. Rep. 437; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 228 254, [fol. 207] 41 L. Ed. 979, 990, 17 Sup. Ct. Rep. 581; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. See also *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367. The railway company accepted its franchise from the state, subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience, and which might, from time to time, be established by the municipality, when proceeding under legislative au-

thority, within whose limits the company's business was conducted. This court has said that 'the power, whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good.' *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 297, 43 L. Ed. 702, 706, 19 Sup. Ct. Rep. 465, 470."

In *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, the City of Minneapolis had acquired certain property for park purposes which included two lakes in their entirety and a portion of the shores of a third lake, together with large tracts of land in the vicinity. It proceeded to construct two canals connecting the three lakes, together with walks on either side thereof. The railroad owned a right of way 100 feet wide which crossed the path of one of the proposed canals and the city sought to condemn an easement for this canal and its lateral walks across this right of way. The railway tracks at the point in [fol. 206] question were located on an artificial embankment 18 feet above the water level of the lakes. It was agreed that the city should take the land and construct the canal and walks and that the railway company should build the bridge according to plans prepared by the city, but the railway company reserved its right to recover damages or compensation in the the condemnation action and claimed, in addition to the value of the land taken (which was paid), that it should be compensated for the entire cost of the necessary bridge across the canal and such further sums as would be sufficient to maintain the bridge. The judgment in the condemnation case awarded to the railroad only the value of the land taken together with the cost of certain features of the bridge which were purely ornamental. In affirming the judgment the Supreme Court of the United States, speaking through Mr. Justice Hughes, said (232 U. S. 437, 58 L. Ed. 674):

"The question thus presented is whether the refusal to allow compensation for the cost of constructing and

maintaining the necessary railroad bridge across the gap in the right of way, made by the building of the canal, amounts to a deprivation of property without due process of law.

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. . . ." (Emphasis ours.)

Quoting from a Minnesota case the court proceeds:

"A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across its [fol. 200] right of way as public convenience and necessity may, from time to time, require. That right on the part of the state attaches by implication of law to the franchise of the railroad company, and imposes upon it an obligation to construct and maintain at its own expense suitable crossings at new streets and highways to the same extent as required by the rules of the common law at streets and highways in existence when the railroad was constructed." . . . (Citing cases.)

"Under the doctrine of these decisions, it necessarily follows that if the city of Minneapolis had opened a public road through the embankment of the plaintiff in error, the latter would have had no ground to complain that its constitutional rights had been violated because it was compelled to bridge the gap at its own cost. No different rule could be applied because the highway was laid out in order to increase the advantages of a public park. In this aspect, it would be equally a crossing devoted to the public use (citing cases); and we see no basis for a distinction in principle in the case of an intersecting public road opened under competent authority because such a highway might lead to public recreation grounds instead of to places of business, or might connect lakes instead of avenues."

In *Missouri Pacific R. Co. v. Omaha* (1914), 235 U. S. 121, 59 L. Ed. 157, the City of Omaha by ordinance required the



railroad to construct a viaduct over its line at its intersection with Dodge Street, together with approaches thereto along the southerly line of Dodge Street, leaving the northerly side of the street open to public traffic. The ordinance required construction of the viaduct in accordance with plans and specifications prepared by the city engineer. The railroad brought this action in the federal courts. The Circuit Court (which was then the federal court of original jurisdiction) dismissed the bill and this decree was affirmed both by the Circuit Court of Appeals and the Supreme Court of the United States. The latter court, speaking through Mr. Justice Day, said (235 U. S. 127, 39 L. Ed. 160):

"That a railway company may be required by the state, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, and that the consequent cost to the company as a matter of law is *damnum absque injuria*, or deemed to be compensated by the public benefit which the company is supposed to share, is well settled by prior adjudications of this court. (Citing cases.)

"This is done in the exercise of the police power, and the means to be employed to promote the public safety are primarily in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted. (Citing cases.)"

In *Lehigh Valley R. Co. v. Board of Public Utility Commrs.* (1928), 278 U. S. 24, 73 L. Ed. 161, the railroad sought to enjoin enforcement of an order made by the Board of Public Utility Commissioners of New Jersey requiring the railroad to eliminate two railroad grade crossings and to substitute in their place a single overhead crossing at the *sole expense of the railroad company* in the amount of \$324,000.00. In

addition to raising the usual constitutional objections, the [fol. 211] railroad claimed that an adequate crossing could be built for at least \$100,000.00 less than the amount it was required to expend under the order and also claimed that the order unconstitutionally imposed a direct burden on interstate commerce and violated the interstate commerce law in that the required expenditures exceeded the legal duties of the railroad and the reasonable requirements of public safety and convenience. The case was instituted in the United States District Court and was heard by a three-judge court which dismissed the bill. On appeal the Supreme Court affirmed the decree of dismissal and, speaking through Mr. Chief Justice Taft, said (278 U. S. 33, 73 L. Ed. 166):

"This highway is not infrequently crowded with vehicles. When route No. 29 is completed, it will certainly be more crowded. The immediate prospect of using new route 29 makes greater room in the roadways most desirable. The large expenditure to secure such advantages does not seem to be arbitrary or wasteful when made for two busy highways instead of one.

"It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant."

. . . . .

[fol. 212] (278 U. S. 34, 73 L. Ed. 167.) "A railroad company in maintaining a path of travel and transportation across a state, with frequent trains of rapidity and great momentum, must resort to reasonable precaution to avoid danger to the public. This court has said that where railroad companies occupy lands in the state for use in commerce, the state has a constitutional right to insist that a highway-crossing shall not be dangerous to the public, and that where reasonable safety

of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. (Citing cases.) This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can reasonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits."

. . . . .

(278 U. S. 35, 73 L. Ed. 167): "The care of grade crossings is peculiarly within the police power of the states (citing cases), and if it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear. It was certainly not intended by the Transportation Act to take from the states or to thrust upon the Interstate Commerce Commission investigation into parochial matters like this, unless by reason of their effect on economical management and service, their general bearing is clear."

[fol. 213] So zealously have the courts guarded the police power of the states and their political subdivisions with respect to railway crossings of highways that they have held in numerous cases where municipalities have by contract agreed with railway companies to pay the expense of maintenance and repair of grade separation structures after their construction, that such contracts are void as against public policy since they constitute the virtual abdication of sovereign powers, it being said in such cases that the "police power cannot be contracted away." See for examples: *Chicago M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, and *Northern Pacific R. Co. v. Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. Ed. 630.



In the latter case the court, speaking through Mr. Justice Day, said (208 U. S. 596, 52 L. Ed. 636):

"There can be question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one, that it cannot be contracted away, and that a requirement that a company or individual comply with police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts. (Citing cases.) . . . We find no error in the judgment of the Supreme Court of Minnesota holding the contract to be void and beyond the power of the city to make, and it will, therefore, be affirmed.

Many other decisions both by the Supreme Court of the United States and by state courts of last resort might be cited in support of this point. The courts are practically unanimous in announcing the law to be as the above cited and quoted cases declare it.

[fol. 214]

### Point III

**There Is No Logical or Legal Basis for the Contention That the Costs of This Grade Separation Improvement Should Be Borne by the Parties Respectively in Accordance With the Benefits To Be Received by Them, nor Are Any Such Benefits Mathematically Calculable**

At the public hearing in this matter the Southern Pacific Company, through its witness Paul, introduced in evidence Exhibit No. 20. This exhibit boils down to an argument that the portion of the costs of constructing the underpass which should be allocated to the Southern Pacific Company should not exceed the benefits to the Company. With this contention we do not agree.

The courts have upheld our position in the few cases in which the question of relative benefits has been presented to them and where no federal aid was involved.

In the case of *State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.* (Mo., 1936), 100 S. W. 2d 522, 109 A. L. R. 754, where the Public Service Commission of the

State of Missouri assessed against the railroad 40% of the cost of an elaborate grade separation *through a public park*, the Supreme Court of Missouri, in sustaining this order, said (100 S. W. 2d 527):

"The Wabash argues strenuously that the separation of the grade was made primarily for the convenience and benefit of the traffic on the highways and that the percent of cost of the improvement assessed against the railroads was grossly out of proportion to benefits received by them . . . . It is evident from the findings of the Commission, which were amply supported by the evidence, that due to crossing gates maintained by [fol. 215] the Wabash the crossing was not very dangerous. The heavy traffic on the highway was compelled to stop for passing trains. This caused considerable delay, inconvenience, and so-called troublesome traffic jams, and materially interfered with the free use of the highway. By the law of necessity all traffic on a highway must give railroad trains the right of way . . . . This is not such a case, but suppose a crossing was considered entirely safe because gates and watchmen were maintained by the railroad company, and let us further suppose that due to the number of trains passing over the crossing it materially interfered with the heavy traffic over a highway, would it be unlawful in such a case to assess a part of the cost of separating the grade crossing against the railroad? The separation in such a case would be for the benefit of the traffic upon the highway and not the railroad, yet the inconvenience created would be due entirely to the presence of the railroad. In such a case it certainly would not be unreasonable to assess against the railroad at least a part of the cost of restoring the usefulness of the highway. In the cases of *State ex rel. Alton Ry. Co. v. Public Service Commission*, 334 Mo. 985, 70 S. W. (2d) 52, and *State ex rel. Alton R. Co. v. Public Service Commission*, 334 Mo. 995, 70 S. W. (2d) 57, cited by the Wabash, structures separating grade crossings were in existence. These were found to be inadequate due to the increase in travel. The railroad was compelled to pay a part of the cost. Note what

this court said in 70 S. W. (2d) 57, *loc. cit.* 60 (5-6): 'Elimination of danger of collision between vehicles and trains and benefit to the railroad because of that or other reasons is to be considered in proportioning costs, but these matters are not alone controlling. Nor is benefit the fundamental consideration in proportioning expense. The true basis of apportionment of [fol. 216] the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement. *State ex rel. Kansas City Terminal R. Co. v. Public Service Comm.*, 308 Mo. 359, 272 S. W. 957. If the presence of the railroad is the sole cause of an improvement necessary for the public safety, it may be required to pay the entire cost. *Chicago, Rock Island & Pacific Ry. Co. v. Public Service Comm.*, 315 Mo. 1108, 287 S. W. 617.' So in *State ex rel. M., K. & T. Ry. Co. v. Public Service Commission*, 271 Mo. 270, 197 S. W. 56, 59, court *en banc*, an existing subway was found inadequate and the major portion of the cost of enlarging the structure for the sole purpose of accommodating the travel upon the streets was assessed against the railroads. This court in the course of the opinion said: '• • • but the safety of passing trains is only one of the elements to be considered in matters of this kind. It is not the sole or controlling element. The convenience and necessities of the traveling public using Rollins Street must likewise be considered.' We see no distinction in principle between those cases and cases where the presence of a railroad renders a street inadequate to accommodate the traveling public." (Emphasis added.)

In the case of *State ex rel. Chicago, R. I. & P. Ry. Co. v. Public Service Commission* (Mo., 1934), 72 S. W. 2d 101, the Supreme Court of Missouri, in sustaining an order of the Public Service Commission dividing the costs of reconstructing an old highway underpass equally between the county and the railroad, said (72 S. W. 2d 103):

"Of the contention that the whole cost of the reconstruction of the grade separation should be borne by



[fol. 217] St. Louis county because relator will derive no benefit, we may say in the words of this court, used in *State ex rel. Kansas City Southern Ry. Co. v. Public Service Commission*, 325 Mo. 862, 30 S. W. (2d) 112, *loc. cit.* 115: 'There is no question of assessment of benefits in the case. It is a question of providing for the public safety by reasonable methods.' The trestle was built, as relator stated in its answer before the Commission, 'in what was known as the horse-drawn vehicle age.' The narrow one-way passage between the supporting bents was reasonably safe in that day. But in this day of motor vehicles, it is full of perils of collisions of automobiles with each other or with the bents. Expert witnesses for the county and for the railroad testified to these hazards."

In the case of *Lehigh & N. E. R. Co. v. Public Service Commission* (1937), 191 Atl. 380, 382, the Superior Court of Pennsylvania, in approving an order of the Public Service Commission of that state requiring the reconstruction of an old and inadequate underpass and allocating the cost thereof among the state, the county and the railroad, said:

"The order of the commission was within its power and supported by the evidence, and is reasonable and in conformity with law.

"Those conditions which may have brought about the necessity for a new underpass do not operate to relieve appellant. It is a question of providing for public safety by reasonable methods. The underpass built in 1911 may have been sufficient at that time; it is ~~inadequate and~~ perilous today. In order to prevent accidents and promote the safety of the public, the com-[fol. 218] mission acted within its power, if the facts warranted, in ordering its reconstruction and in apportioning the cost thereof. Appellant's contention that it will receive no benefit from the proposed construction is not convincing. The question of benefits is not involved. 'It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad.' *Lehigh Valley R. R. Co. v. Public Service Comm.*, 105 Pa. Super. 423 at page 428, 161 A. 422 at page 424."

If benefit to the railroad were a relevant consideration in this case, the benefit already accorded to the railroad at the expense of the public in the form of right of way at grade crossings should also be considered. This privilege could be removed by the Public Utilities Commission at any time. The Commission, for reasons of safety and giving due consideration to the needs of both railroad and street traffic, could require the railroad trains to yield the right of way to street traffic as often as street traffic was required to stop and yield the right of way to railroad trains. The resulting delays to the railroad, as well as increasing hazards of the railroad and consequent liability of the railroad for public injuries, would be incalculably great.

The Railroad has indicated there will be only an insignificant benefit in respect to the hazard of accidents and consequent possibility of liability [Ex. 20] based upon experience during the past ten years at the Los Feliz crossing. [Tr. [fol. 219] 313.] The probability of increasing instances of backlash occurring in future years [Tr. 197] when traffic volumes on Los Feliz increase [Tr. 185] with vehicles being repeatedly stopped upon the railroad tracks and unable to move [Tr. 191] certainly presents a hazardous condition at the crossing and it should not be necessary to await a serious accident which might cost the company as much as the cost of constructing the grade separation before considering the benefit derived from the elimination of such a hazard.

With respect to the insignificant amount of benefit claimed by the Railroad in connection with the hazard of accident and consequent possible liability of the railroad for public injuries, the words of Mr. Justice Holmes in the case of *Erie R. Co. v. Board of Public Utility Commissioners*, 254 U. S. 394, 413, 65 L. Ed. 322, 335, are characteristically pertinent and concise:

"If we could see that the evidence plainly did not warrant a finding that the particular crossings were dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an

advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*" (Emphasis added.)

[fol. 220]

#### A. The Nashville Case

The petitioner stresses the case of *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 404, 79 L. Ed. 949, in the belief that that decision changes the law set forth earlier in this brief. For reasons which will be hereinafter explained, we do not concur with petitioner's belief. In considering that case, the following points should be noted:

##### One.

The Tennessee statute there involved did not confer any discretion upon the Commission, but instead required the railroad in every case to pay one-half of the cost of a grade separation. (79 L. Ed. 949 at 954.) Here our statute gives to the Commission discretion to allocate the costs and does not purport to make an arbitrary assessment against the railroads.

##### Two.

In the *Nashville* case, the railroad conceded

"that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate." (P. 954.)

The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore the issue as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in this proceeding was not even an issue in the *Nashville* case. The railroad conceded that in such case it could be required to pay the entire cost!



[fol. 221] Three.

The only point decided by the Supreme Court of the United States was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all the Supreme Court of the United States did was to remand the case to the Tennessee court for consideration of those special facts. The Supreme Court of the United States did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead it expressly stated that it was not making such a determination which was, in the first instance, for determination by the Tennessee court. (P. 965.)

Included in the evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

(a) that the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

(b) that the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power; but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United States in conjunction with the several states to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

(c) that the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, widening the pavement, *et cetera*;

[fol. 222] (d) the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce."

The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails;

(e) the relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

(f) Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

(g) that the present facilities were deemed locally both safe and adequate was attested by the fact that neither the city authorities, nor anyone else, had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route continued to be used for the local traffic;

[fol. 223] (h) the underpass was required for a new and additional highway over which State Highway No. 20 was being rerouted, which was to become a part of a Federal-aid route between Nashville and Memphis;

(i) the underpass was prescribed, *not upon consideration of local safety needs*, but in conformity to general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades, were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.* (79 L. Ed. pp. 956-961).

In other words, the underpass there involved was con-

structed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and no authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing.

As was stated by the Supreme Court of the United States in the *Nashville* case (at p. 964):

"\* \* \* No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

[fol. 224] This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety, but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade separation involved in the instant proceeding. In the *Nashville* case we had a grade crossing in a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the improvement. No new route is being established. The existing grade crossing is being eliminated to remove a dangerous condition, such elimination being necessary in order that the street can safely handle local transportation needs.

In the *Nashville* case the Supreme Court of the United States expressly recognized the principle of law which we here urge. The court stated (at p. 964):

"It is also true that state action imposing upon a railroad the cost of eliminating a dangerous grade



crossing of an existing street may be valid although it appears that the improvement benefits commercial highway users who make no contribution toward its cost. *Chicago, E. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 75, 42 L. ed. 948, 954, 18 S. Ct. 513; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 S. Ct. 82, that a railroad has no constitutional immunity from [fol. 225] having to contribute to the cost of safeguarding a crossing with another railway line, merely because the first railroad was built before the crossing was made; *Detroit, F. W. & B. I. R. Co. v. Osborn*, 189 U. S. 383, 47 L. ed. 860, 23 S. Ct. 540; *Northern P. R. Co. v. Puget Sound & W. H. R. Co.*, 250 U. S. 332, 63 L. ed., 1013, 39 S. Ct. 474, and that the State may, under some circumstances, impose upon a railroad the cost of the grade separation for a new highway. But in every case in which this Court has sustained the imposition, the new highway was an incident of the growth or development of the municipality in which it was located. *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 592, 52 L. ed. 630, 641, 28 S. Ct. 341; *Cincinnati, I. & W. R. Co. v. Connersville*, 218 U. S. 336, 54 L. ed. 1060, 31 S. Ct. 43, 20 Ann. Cas. 1206; *Chicago, M. & St. P. R. Co. v. Minneapolis*, 232 U. S. 430, 58 L. ed. 671, 34 S. Ct. 400; *Eric R. Co. v. Public Utility Comrs.*, 254 U. S. 394, 409, 63 L. ed. 322, 333, 41 S. Ct. 169, P. U. R. 1921C, 143. Compare *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 554, 58 L. ed. 721, 725, 34 S. Ct. 364. And in every such case the municipality apparently bore the cost of constructing the new highway for which grade separation was required."

It should also be emphasized that the Supreme Court of the United States expressly stated, in the *Nashville* case, at page 965:

"We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the State court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first [fol. 226] instance, be made by the Supreme Court of

the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not inquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases.) \* \* \*

It is our considered opinion that the *Nashville* case, when properly analyzed, clearly supports the proposition that, in connection with a grade separation such as we are here considering, the railroad can be required to pay the entire cost of the improvement, or such lesser amount as the Commission may deem proper.

Trucks and buses passing over the Los Feliz grade crossing constitute a very small percentage of the total vehicular traffic using the crossing. [Ex. 2, p. 25.] Witness Albers testified that local transit buses accounted for most of the buses which pass over the crossing and that no certificated carrier other than the two local transit companies operated over the crossing. [Tr. 125.] Witness Albers, when asked whether the trucks that passed over the grade crossing were engaged in local transportation or local hauls, testified that the trucks were principally engaged in delivery services and other services pertaining to a neighborhood. [Tr. 126.] This testimony was uncontradicted. Thus, in the case of the Los Feliz grade crossing, we find that it is used by few if any vehicles in competition with the railroad, while it is used by [fol. 227] a large number of vehicles carrying thousands of passengers to and from the Glendale station of protestant. [Tr. 126.] The ever increasing volume of traffic at the crossing has been caused by the growth of the Los Angeles metropolitan area. It seems clear that if the Supreme Court in the *Nashville* case had been confronted with the factual situation comparable to that surrounding the Los Feliz grade crossing, it would have reached a different conclusion

and would have sustained a requirement that the railroad pay the full cost of constructing the grade separation.

Cases more recent than the *Nashville* case clearly establish that such case was not a reversal of the many prior cases holding that a railway could be required to pay up to 100 per cent of the cost of a grade separation. Instead, the *Nashville* case is applicable only to the factual situation there presented.

The case of *Lyford v. State of New York*, 140 F. 2d 840, decided in 1944, involves a claim of the State of New York against an insolvent railroad. The claim arose under the New York Grade Crossing Elimination Act of 1926:

"\* \* \* This act empowered the State Public Service Commission to order the elimination of any grade crossing which in the Commission's opinion was a menace to the public safety. Half the cost of the elimination was to be borne by the railroad whose crossing was to be eliminated, half by state and county governments, in the proportion of 49 per centum by the State and one per centum by the county or counties in which the crossings were located. If the railroad so elected, the State was authorized to pay the railroad's share in the first instance, the railroad being obliged to repay the State in a manner to be determined by the State comptroller, so that the principal and interest [fol. 228] of the State debt incurred for such elimination might be repaid when due." (Pp. 841-842.)

Under these provisions the railroad became indebted to the State in the amount of some \$425,000. Thereafter the railroad filed a voluntary petition for reorganization under Section 77 of the Bankruptcy Act. A claim was filed by the State and the question was raised as to the validity of such claim.

In holding the claim valid, the court stated (p. 844):

"\* \* \* It is well settled that in the exercise of its police power for the protection of its citizens a state may require of even an interstate railroad that it abolish grade crossings at its own expense entirely, whatever the cost and without regard to its financial ability. See extensive discussion by Holmes, J., in *Erie*



*R. Co. v. Board of Public Utility Com'rs*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322, citing earlier cases; \* \* \* (citing cases). Hence this duty, which could have been required of the railroad alone, is here shared with the state and county governments; and the additional privilege of installment repayment is also granted, but only upon conditions carefully safeguarding the interests of the State." (Emphasis added.)

A petition for a writ of certiorari to the United States Supreme Court was of course denied. (323 U. S. 714, 89 L. Ed. 574 (1944).)

This recent case gives no indication of any "trend" claimed by petitioner, and we again wish to emphasize that the *Nashville* case, by its very terms, turns upon a finding that the elimination of the grade crossing there involved "was not in any proper sense an exercise of the police power" (79 L. Ed. 949, 956, 204 U. S. 405, 417), and was to [Vol. 229] a large degree an expenditure "for the relief of unemployment" (79 L. Ed. 949, 957, 204 U. S. 405, 418-419).

The matter involved in the *Lyford* case was again before the Court in *State of New York v. Gebhardt*, 151 F. 2d 902, certiorari denied 327 U. S. 788, 90 L. Ed. 1015.

Of course, it should also be mentioned that here again State highways and State funds were involved, rather than a city street. The railroad's obligation, as heretofore shown, is much greater when city streets are involved. This is undoubtedly the basis of the later amendment to the New York Act.

A case decided at approximately the same time as the *Nashville* case is that of *In re New York O. & W. Ry. Co.*, 280 N. Y. Supp. 174 (Affirmed 3 N. E. 2d 188). That case clearly indicates that the true rule is whether or not the public benefits; if so, the grade crossing may be eliminated regardless of benefit to the railroad, and the railroad can constitutionally be required to pay the entire cost, although in that case the statute only required the railroad to pay one-half of the cost.

Again in 1937, in the case of *In re Elimination of Highway-Railroad Crossings*, 299 N. Y. Supp. 693, the railroads were required to pay one-half of the cost, as provided by statute, regardless of the fact that "the New York Central

urges two objections to the order. It insists that it not only derives no benefit whatever from the new construction, but that it is decidedly damaged by reason of the change," especially in view of the fact that there was already an underpass under its tracks and that the new alignment would require its patrons to travel some 7,000 extra miles each year to reach its station.

[fol. 230] Incidentally, it might be mentioned that included in the cost of that grade separation was the cost of paying some 3,332 feet of new highway outside the subway itself.

There is, of course, a fundamental difference between a crossing separation which is a "make-work" project, using Federal funds, and a crossing separation which is admittedly necessary for the public health, safety and general welfare; or between a grade separation for private benefit, and a grade separation required by the public health, safety and general welfare. An analysis of the cases will show that, regardless of direct benefit, the railroad "has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks both at grade and at separated grades." (37 C. R. C. 767.) Further, "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." (*Erie R. Co. v. Board of Public Utility Com'rs* (*supra*), 254 U. S. 394, 409, 65 L. Ed. 322, 333.) The element of direct benefit is absolutely immaterial.

### B. Cases and Decisions Involving Federal Aid

The petitioner cites in its memorandum of Points and Authorities numerous cases and decisions from this and other states involving methods of apportionment where federal aid is involved. In citing such cases the petitioner wholly fails to recognize the essential distinction between the present case and that of highway construction under Federal-Aid Acts. The instant case represents an exercise of the police power by the State in its right to maintain and improve a public street, such improvement being required [fol. 231] by public safety, convenience and necessity. The

improvement is not to be financed in any part with federal aid funds.

The fact that the Federal-Aid Highway Act of 1944 and its predecessor acts limit, and in some cases eliminate, the imposition of any charge upon railroads for the cost of grade separations or modifications thereof is of no consequence here. That act does not represent an exercise of the police power by a sovereign state, but is merely an instance of a voluntary and benevolent expenditure of public funds for the benefit of the public and the various states. Obviously the Federal Government, being subject to no applicable constitutional limitations in such cases, is free to prescribe any conditions or limitations it chooses to place upon the distribution of any such gratuities. Any state not desiring to accept the federal aid subject to the prescribed conditions and limitations is free to so refrain. Moreover, if such gratuities were to be conditioned upon the imposition upon the railroads of their fair share of the cost of grade separations, the very objective of the Act would have been defeated.

The practice under the Federal-Aid Highway Act obviously has very little to do with benefits because it limits a railroad's allocation to 10%, whether or not the actual benefits are many times that percentage. On page 36 of its brief, petitioner refers to General Administrative Memorandum No. 325 of the U. S. Bureau of Public Roads issued in 1948. In that memorandum are the following statement and finding:

"Experience has demonstrated that it is impossible to measure benefits satisfactory for individual railway-highway projects."

[fol. 232] (Finding) "2. That experience under the Act has demonstrated that many of the elements of railway benefits are so vague and difficult of evaluation, are so intangible or speculative, and are the subject of such divergence of views on the part of the railroads and the State highway departments that it generally has been and is impossible for them to arrive at a mutually acceptable basis for negotiating the agreement required of them for undertaking individual railway-highway projects. This has resulted in prolonged and futile ne-



gotiations in an effort to arrive at a basis of agreement and has defeated the undertaking of many urgently needed projects."

### C. Basis of Apportionment Followed Nationally and in Other States

Petitioner has argued that the trend nationally is toward allocating costs of grade separation on the basis of benefits. It would probably be more accurate to say that in recent years the railroads have successfully secured passage of legislation by more and more states relieving them of their legal obligation to provide adequate grade crossings.

As further evidence of the trend toward the so-called "benefits" principle of allocating costs, petitioner referred on page 33 of its Memorandum of Points and Authorities to Exhibit "H" attached thereto. However, it should be noted that not a single state is shown in Exhibit "H" as allocating costs strictly upon the basis of benefits. Either a limit is fixed upon the amount to be allocated to a railroad, or a fixed percentage is assigned to a railroad, or the allocation is fixed by a state agency, and not a single state agency is indicated as apportioning costs strictly upon the basis of benefits.

[fol. 233]

### Point IV

#### The So-called Benefits Theory as Advocated by the Railroad Does Not Include Any Calculation of Many Obvious Benefits.

Petitioner's principal position appears to be that of advocating an allocation of expenses on the so-called benefits theory. We do not subscribe to this theory for many reasons: (1) it is impossible to compute real benefits with any degree of certainty; (2) it completely disregards the legal rights of the City of Los Angeles and the City of Glendale to use their street free from obstruction or interference; (3) it further disregards the legal obligations inherent in the operation of the railroad. However, in view of the strenuous argument made by the Railroad in this regard, we feel it might be well to call attention to some of the benefits received by the Railroad.

### A. General Principle to Be Used in Determining Benefits Received by Railroad

First, there can be no question that, as a matter of equity, if the railroads are to be given the right of way over vehicular traffic at points where the railroads cross public streets, then all costs incident to making such crossings safe should be assessed against the railroads. This being so, it necessarily follows that when the inconvenience to the public resulting from giving the railroads such right of way becomes so oppressive and hazardous to the public that grade separations are necessary, the railroads should be required to pay the cost of such grade separations in excess of that which it would cost the cities to improve their public streets in the absence of the rail- [fol. 234] roads. We recognize that the method of railroad operation is such that it would be extremely costly and impractical, if not impossible, to require the railroads to yield the right of way to vehicular traffic. That is the reason the railroads have received special consideration and have been accorded the right of way. However, as an incident of, and a condition upon which the railroads were accorded such special treatment the obligation to provide safe grade crossings and necessary grade separations was properly levied against the railroads. If the railroads would operate in the same manner as other traffic and comply with the laws of the road applicable to other traffic, this special burden would of course not be assessed against the railroads; there would be no necessity for such special treatment. But the special privileges enjoyed by the railroads, accorded to them so that they might operate in a preferred manner, entail certain obligations, of which this is one.

Therefore, the entire premise upon which Mr. Paul and other Railroad witnesses attempt to determine the benefits accruing to a railroad from a grade separation is entirely false. *This is so as their computations and opinions have all been predicated upon the assumption that the railroad has the absolute and unconditional right to operate in total disregard of all other traffic, both vehicular and pedestrian.*

The railroads have not been given the right of way over other traffic without having placed on themselves

the obligation to provide necessary crossing protection, [fol. 235] and to provide, at their sole expense, grade separations when required by the public convenience and necessity.

As was stated by the Supreme Court of the United States speaking through Mr. Chief Justice Hughes, in *Chicago, M. & St. P. R. Co. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 671, at 674:

"It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

Numerous other cases, holding that a railroad is obligated to pay the entire cost of a grade separation, could be cited. This has always been the law, and it is still the law.

The only time the railroads cannot be required to pay the full cost of grade separations is when there is a statutory provision specifically providing otherwise. Such statutes indirectly provide further subsidies to the railroads and are, in effect, gifts of public funds to the railroads. In California the statute does not provide any specific amount which the railroads shall be relieved of paying, but instead leaves it to the discretion of the Public Utilities Commission. In our opinion, it would be an abuse of discretion for the Commission to apply the so-called benefits theory on the basis argued for by the railroads. To do so would be totally unrealistic and would completely disregard the legal and equitable obligations of the railroads.

[fol. 236] If the railroads are no longer willing to assume the burden necessarily imposed upon them as a concomitant part of the special privileges they enjoy, then let them also relinquish their special privileges.



## B. Benefits From Longer Trains

In connection with the benefits which the railroads receive from grade separations, there are of course numerous other matters which should be mentioned.

With the operation of longer trains, which are a benefit to the railroads, the railroads receive a greater benefit from grade separations. *But for the existence of grade separations at critical crossings the public would not endure the intolerable delays at these grade crossings which would result from these longer trains.* In fact, the public, in righteous indignation, would demand the elimination of all grade crossings at the expense of the railroads, if it were not for separations at major crossings.

## C. Benefits From Use of Tracks for Storage Purposes

Mr. J. A. Mellen, Planning Director of the City of Glendale, testified that with the separation of grades at Los Feliz the Railroad would have a track length of 4,815 feet for temporary storage of trains. [Tr. 68.] This length would be sufficient to store all freight trains operating over the Valley Line where trains are limited to 86 cars in length [Tr. 253], or approximately 4,730 feet long calculated by allowing 50 feet per car and caboose and 380 feet for diesel units. [Tr. 245.] Trains operating on [fol. 237] the Coast Line would be longer and if they were stored on the tracks across Los Feliz they would only block a minor crossing at Chevy Chase Drive. [Shown in Exhibit 19.] While the Railroad Superintendent denied that the Railroad would stop a freight train on the main line [Tr. 244], he admitted that on occasion they did so. [Tr. 247, 252.] While claiming that the track distance of 4,815 feet between Brand Boulevard and Chevy Chase [Tr. 68] upon which an 86-car train could be stored would be of no value to the Railroad for temporary storage purposes, the Superintendent indicated that another section of track sufficient to store a 72-car train [Tr. 247] of which the Railroad operates only a few [Tr. 254], would be of value for storage. [Tr. 247.]

From the foregoing facts, it is not difficult to see that there will be benefit to the Railroad with respect to its

ability to use the track for temporary train storage purposes.

#### D. Benefits From Use of Streets as "Feeder" for Railroad

The railroad itself materially benefits from use of the public streets as feeders for its railroad business. This is illustrated by the following testimony of Mr. Mellen:

"Q. Could you describe the relationship of the crossing to the Glendale depot of the Southern Pacific Railway, Southern Pacific Company? A. It is only a short distance from the Los Feliz crossing to the depot grounds. As a matter of fact, in the original grant to the railroad, a portion of the depot [fol. 238] grounds abut the crossing itself on the southeasterly side.

Mr. Karr: Could you repeat that again? I am sorry.

(Record read.)

The Witness: The station is an important one in the metropolitan area, being a metropolitan sub-center type of station where passengers, particularly from all of the Hollywood area and all of the Glendale area and the La Crescenta Valley, much of the—well, yes,—all of the La Crescenta Valley, and anyone who seeks to avoid the congestion and problems of the central (center) of Los Angeles at the Union station, use this station as the convenient means of boarding trains. All of the passengers who approach the station from the west and southwest approach it by way of Los Feliz Boulevard, or some highway that reaches and comes from that direction. Therefore, it is quite important as far as the convenience of the customers of the railroad that a safe crossing be provided, safe and convenient crossing. There are, I would say, literally thousands of passengers who board at that point, or disembark at that point, in order to avoid the delay of going on into the city of Los Angeles and to be in a position to more directly reach their respective destinations without going through the congested portion of the metropolitan area." [Tr. 65, 66.]

Although witness Paul for the Railroad denied that the grade separation would be a benefit to patrons of the [fol. 239] Railroad in reaching the Glendale station because it would be a circuitous route for some, he also admitted that the greater percentage of the patrons use Gardena Avenue for an approach to the station. [Tr. 322.] An examination of Exhibit 19 shows that the Gardena Avenue approach is only slightly longer and Exhibit 2, page 20, indicates that the Gardena Avenue approach will still be available for use by patrons of the Railroad.

Thus, the Railroad witnesses contend that motorists should be made to pay almost all of the cost of the grade separation because they receive most of the benefit, but for some unexplained reason, motorists on their way to patronize the Railroad are not benefited.

#### E. Benefits Accruing to Railroad From Elimination of Grade-crossing Accidents

In connection with benefits received by the railroads from grade separations, it is important to consider grade crossing accidents.

While the accident experience at the Los Feliz crossing in recent years indicates an average annual cost to the Railroad of only \$475.00 per year [Ex. 20], one serious accident could involve a substantial amount of damage to railroad property. [Tr. 347.] It is obvious that one accident might involve the railroad in large claims for injuries to persons or property. The estimate of future damage claims based upon experience of the past ten years is inadequate and purely speculative considering the increased hazards which will develop as traffic volume on Los Feliz [fol. 240] increases. From the safety standpoint, a grade separation is a great benefit to the Railroad, a benefit growing greater every day.

#### F. Benefit From Improved "Good Will"

Another factor, although intangible, is "good will." Certainly a railroad loses good will by these grade crossings. And we are not here referring to those poor unfortunates who are mangled and maimed by the trains, nor



to the widows and orphans of the victims slaughtered at grade crossing accidents. Neither are we referring only to the passengers who are on the trains delayed by the accident, nor to the relatives and friends of such passengers who patiently (or impatiently) wait at the station to meet the arriving passengers, only to see the time of arrival of the train repeatedly changed to a later hour. Primarily we are referring to the motorist, who potentially is a patron of the railroad, either as a passenger or shipper, who, while delayed at a grade crossing, swears to never again patronize that railroad.

#### G. Benefit From Improved Drainage of Station Grounds

At times of heavy rainfall, water flows in the track area, flooding the tracks at the grade crossing and also the Glendale station of the Southern Pacific Company. [Tr. 129.] When the grade separation is constructed it will intercept and collect the water now passing over the Los Feliz crossing. The disposal of the water through the grade separation drainage structure will remove such water from the tracks at the crossing and improve conditions at the station. [Tr. 130.]

[fol. 241]

#### Point V

#### The Orders of the Commission Constitute a Justified and Reasonable Exercise of the Police Power

The Railroad has contended that the police power may only be exercised to promote public safety and convenience, and that there was no evidence of unsafe conditions, or that the Railroad had contributed to a situation where the convenience and necessity of the public are adversely affected. [Petitioner's Memorandum of Points and Authorities, p. 60.] We do not agree with petitioner's conclusions from the evidence.

The grade crossing has been the scene of many accidents. [Ex. 2, p. 30.] Fortunately the accidents to date have not been particularly serious. This is due, in part, to the fact that crossing gates are maintained day and night and all vehicular and pedestrian traffic is stopped at the approach of trains. However, this method of protecting the grade crossing is now creating other hazardous

conditions because of the great volume of local traffic now necessarily using Los Feliz. The stopping of this traffic for the length of time necessary for a long freight train to clear the grade crossing results in "backlashing"; that is, delayed traffic backs over San Fernando Road and other streets. [Tr. 188.] For example, vehicles caught in this "backlash" become completely blocked in the intersection of San Fernando Road and Los Feliz. Unable to go either forward or backward, these vehicles are helplessly trapped in a very hazardous situation, with heavy traffic, including many large trucks, approaching such [fol. 242] trapped cars at substantial speeds, from both directions on San Fernando Road.

"Backlash" now occurs on the railroad during peak hours. [Tr. 189, 190, 191.] As traffic flow on Los Feliz increases in the future, backlash will become a common occurrence. [Tr. 197.] Traffic volume has increased from 16,000 vehicles per day in 1923, to 27,000 vehicles per day in 1951 [Ex. 2, p. 4] and traffic volume is expected to increase. [Tr. 185, 193, 197.] The standing of vehicles on a grade crossing as a result of backlash, unable to move forward or backward, presents an obviously hazardous situation, and such a situation can be expected to be a common occurrence in the future. [Tr. 197.]

The Railroad has contended that it has not by any act created or increased any inconvenience, obstruction, or interference affecting the general public who use the Los Feliz crossing. [Petitioner's Memorandum of Points and Authorities, p. 60.] But what does the evidence show?

The number of train movements has increased materially since 1936. [Tr. 71, 107.] On August 7 and 8, 1936, at the Goodwin Avenue crossing, which is over a half mile from the Los Feliz crossing [Ex. 19], there were 24 or 25 train movements counted per day inclusive of any switching operations [Tr. 107], while on Sunday, June 17, 1951, there were 54 train movements (exclusive of 9 switching movements), on Monday, June 18, 1951, there were 60 train movements (exclusive of 16 switching movements), and on Wednesday, June 20, 1951, there [fol. 243] were 59 train movements (exclusive of 13 switching movements). [Ex. 4.] It is thus apparent that the

number of freight and passenger trains has increased from not more than 24 or 25 per day in 1936 to 59 or 60 per day in 1951, an increase of approximately 140%.

During the period of service of Harry R. Gernreich, Superintendent of the Los Angeles Division, Southern Pacific Company train lengths increased from 35-car trains when he was a brakeman to the present day 90- to 100-car trains which are quite common. [Tr. 256.] During the past twenty-five years train lengths have increased from 75- to 80-car trains to 90- to 100-car trains [Tr. 256] or at least 20%.

The increased number of train movements and the increase in the length of trains operated obviously has increased the inconvenience to, obstruction of, and interference with that portion of the public using the Los Feliz crossing.

The present condition at this grade crossing presents an intolerable situation, both from a safety and a delay factor. Even assuming that the operation of crossing gates, with no regard to the delay caused to vehicular and pedestrian traffic, renders the grade crossing itself relatively safe, this does not eliminate the hazard caused by the grade crossing. As has been shown, this merely transfers the main point of hazard from the grade crossing itself to other intersections. But it is the grade crossing which causes the hazard.

[fol. 244] Further, we do not believe it to be the law that public convenience can be totally disregarded in determining steps necessary to make a grade crossing safe. If this were the law the simple procedure would be to permanently close the public street. Obviously, it would be absurd for the Railroad to argue that by closing the public street the hazard of the existing grade crossing could be removed without the necessity of constructing a grade separation. It is equally absurd to argue that this heavily traveled street may be temporarily closed at more or less frequent intervals, with the resulting chaotic interruption of vehicular and pedestrian traffic, as a means of making the crossing safe. The expediency of temporarily closing a public street in order to make a grade crossing safe may only be resorted to when to do so does not cause excessive



public inconvenience and delay. The hazard resulting from a grade crossing must be eliminated in a manner which does not cause excessive public inconvenience or delay. When the application of this principle requires a grade separation, then the railroad can be required to pay the full cost of the grade separation, or such lesser amount as the Public Utilities Commission may determine. In this case the Public Utilities Commission has determined that the public safety, convenience and necessity require the separation; that it is practical to provide the separation; and that the costs should be allocated as set forth in its order. This order of the Public Utilities Commission is valid and binding.

[fol. 245]

### Conclusion

Throughout these entire proceedings the City of Los Angeles and the City of Glendale have maintained the position that the proper basis of allocating expenses of a grade separation involving a city street is to require the cities to pay the amount it would cost the cities to improve the city street, in the manner proposed, if there were no railroad tracks; and to require the railway to pay the additional cost resulting from and necessitated by the presence of railroad tracks.

As has been stated:

“\* \* \* The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement.”

*State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.*, 100 S. W. 2d 522, 109 A. L. R. 754.

See, also:

*State ex rel. Kansas City Terminal R. Co. v. Public Service Comm.*, 272 S. W. 357.

The formula<sup>a</sup> advocated by the City of Los Angeles and the City of Glendale can be applied with mathematical exactness in every case, and, in our opinion, gives full and

proper consideration to both the legal and equitable principles applicable to grade separations.

We recognize that under the law the Public Utilities Commission has the exclusive power to allocate costs of [fol. 246-252] grade separations. When, as here, the Commission, after a full and fair hearing, and based on adequate evidence and findings, and in the exercise of a sound discretion, makes an order allocating costs, then the order of the Commission is a final determination of the matter.

We therefore respectfully submit that the Petition for Writ of Review should be denied.

Ray L. Chesebro, City Attorney, Bourke Jones, Assistant City Attorney, Roger Arnebergh, Assistant City Attorney, Attorneys for the City of Los Angeles, a Real Party in Interest.

Henry McClernan, City Attorney, John H. Lauten, Assistant City Attorney, Attorneys for the City of Glendale, a Real Party in Interest.

[fol. 253] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITIONER'S REPLY TO ANSWER OF THE RESPONDENT PUBLIC UTILITIES COMMISSION AND TO ANSWER AND BRIEF OF THE CITY OF LOS ANGELES AND THE CITY OF GLENDALE—filed January 22, 1953

### Foreword

The principal decision of the Public Utilities Commission in the present proceeding, rendered June 30, 1952, is identified as No. 47420, and is now officially reported in the Commission's published decisions: 51 Cal. P.U.C. 788. A supplementary decision, identified as No. 47597, which denied the [fol. 254] petition for rehearing filed by this petitioner, but made certain minor changes in the text of the principal decision, was rendered August 19, 1952. Both of these decisions were reproduced in the Appendix to our petition:

No. 47420 at pages 19-36 inclusive, and No. 47597 at pages 84-85.

More recently, at the instance of the City of Glendale, the Commission rendered its further decision No. 47819 in this proceeding, in which it postponed the prescribed date for the commencement of the construction provided for in the principal decision, pending the expected court review thereof. Decision No. 47819 is reproduced in a Supplemental Appendix, attached to this reply. It should be added that this petitioner did not either assent to, nor oppose, the postponement requested by the City of Glendale.

The Commission, as the principal respondent, has filed a lengthy answer to our petition addressed to this Court. The Cities of Glendale and Los Angeles, as parties in interest, have also filed a separate answer and brief in opposition to the petition. While the Commission and the Cities advance somewhat similar arguments, we have thought it preferable, for the sake of convenience in analyzing their separate presentations, to treat them separately, except as to certain limited matters where the answers largely duplicate one another. The first part of this reply is therefore directed to the Commission's answer (for convenience generally identified simply as the "answer"); and the second to the Cities' answer and brief (for convenience generally referred to as the "Cities' Br.>").

At the outset we direct attention to the fact that the Commission's answer demonstrates that it has made erroneous findings and conclusions in two vital respects:

[fol. 255] First, it has erroneously found, in the paragraph (on p. 795 of its printed report, p. 32 of the Appendix to our petition) in which it states that the construction of the Los Felix underpass is appropriate and practicable, that such construction is *in the interest of public safety*. Its own analysis of the evidence (its answer, p. 12) shows that no substantial safety consideration is involved; indeed, as we point out more fully by calculation from the facts recited by the Commission at this page of its answer, it is shown that the actual hazard of a collision of a motor vehicle with a train at this crossing is less than one to 13,000,000; and the hazard of a casualty to a person



in a motor vehicle at the crossing is less than one to 35,800,000.

Second, it has erroneously found in the paragraph immediately following the paragraph last referred to, that the proposed construction does not concern a state highway. Its own recital of the facts, at page 5 of its answer, shows that the stoppage of traffic at the railroad crossing at Los Felix causes a "backlash" of traffic that affects San Fernando Road; i.e., U. S. Highway 99, only 820 feet away; and that the proposed grade separation, if constructed, would relieve this congestion. This second erroneous finding is equally vital to the decision under challenge: because, as more fully shown in our original petition and again in the discussion which follows, if a state highway is concerned, the State Department of Public Works is involved, and may and should be called upon to contribute. In that event Federal highway funds, furnished to the State by the Federal Government, would be used; and the railroad's contribution would be limited, by Federal law, to its actual benefits, not exceeding 10 per cent of the overall cost.

[fol. 256] Apart from these two vital errors, each of which is fully apparent on the face of the Commission's answer, this case involves the broader question whether, in the light of controlling constitutional principles as declared by the United States Supreme Court, the Commission can disregard special facts showing that safety is not involved, and that the proposed construction is for the primary and, indeed, practically the sole purpose of permitting and promoting the rapid and uninterrupted movement of motor traffic; and whether by reason of such disregard the Commission can then reject the sound principle that contribution by the interested parties to a grade separation shall be in accordance with the benefits respectively derived; and instead of following that principle, and without any other basis than its own arbitrary conclusion, require this petitioner, the interested railroad, to pay half of the total cost, or any other amount far exceeding any possible or even arguable benefit which it will receive.

## I

Reply to Answer of the Public Utilities Commission  
"Preliminary Statement"

Answer, pages 1-5

The Commission's preliminary statement contains a summary of some of the facts, which as we view the record is substantially correct. This statement identifies the location of the grade-separation involved; states the names of the interested parties; and recites that a cooperative investigation was undertaken (in which petitioner participated) for the purpose of studying the various types of structures which should be considered, the estimated costs of the construction, and certain other factors pertinent to [fol. 257] the question whether the separation was economically justified. As stated by the Commission, that study was introduced in evidence (as Exhibit 2) in the proceedings before the Commission leading to the decision and order here under challenge. It may be added that the title page, and Part V, of that exhibit, are reproduced as Exhibit F in the Appendix to the petition herein (pp. 86 to 91, of the Appendix).

We have already called attention to the fact that the Commission declares and admits (Ans., p. 5) that the instant record shows that stoppage of traffic at the present Los Feliz crossing causes a "backlash" of traffic that affects traffic on San Fernando Road, and that this interference and congestion would be remedied by the proposed separation. San Fernando Road is otherwise known as U.S. Highway 99, a Federally-aided highway. This admission is significant, because of the Commission's subsequent attempt (Ans., p. 51) to complain of petitioner's criticism of the finding, made by the Commission (as we have recited) at page 795 of its printed decision (51 Cal. P.U.C. 788; p. 32 of the Appendix to the petition) that the proposed construction *does not concern* a state highway. It is obvious, from the record and the Commission's present admission, that one of the reasons urged for the proposed construction is to relieve or avoid vehicular congestion (i.e., blocking at the intersection) upon a principal state highway, at a

point only 820 feet from the present crossing. In the face of these facts, it is clear that petitioner's comment upon this finding (p. 37 of petitioner's opening brief) is fully justified. If it was not the Commission's purpose to avoid contribution by the State Department of Public Works because of the involvement of the state highway, that fact [fol. 258] should have been disclosed by forthright avowal in the answer. Certainly the finding is erroneous, and directly contrary to the evidence; and that error is now openly confessed by the Commission.

At pages 6 and 7 of its answer the Commission refers to the estimates of the various benefits which would result from the construction of the Los Felix separation. The staff studies to which the Commission refers appear at pages 793-794 of the printed decision (p. 28 of the Appendix to the petition). They were taken from Part V of Exhibit 2 in the proceedings before the Commission (at p. 87 of the Appendix). This showing indicates that the total annual monetary saving, including an estimated amount (\$57,362) to cover savings to operators of motor vehicles, because of the elimination of "vehicular delays," would be \$71,890; but this would be offset by additional expenses for depreciation and maintenance on the railroad portion of the proposed structure, amounting to \$8611. The result would be a net annual saving, accruing to all parties interested in the structure, amounting to \$63,279; but as stated, \$57,362 of this sum would be the benefits realized by the motor-vehicle operators, through the elimination of delays to their motor vehicles. The balance, \$5917, represents the sum total of the actual net benefit to petitioner. Thus on the basis of the Commission's own estimates of monetary benefits from the proposed construction, petitioner would realize only 9.35 per cent of the total annual benefit (the ratio of \$5917 to \$63,279).

It is not correct, as stated by the Commission (Ans., p. 6) that petitioner contended that the grade-separation [fol. 259] would have been of no benefit to the railroad, or that there would be no saving to the company in money paid to employees. On the contrary, the petitioner agrees that it would save \$14,053 per year in the cost of operating and maintaining the crossing gates, which figure includes



the wages of the crossing gatemen or watchmen; and it agrees also that it could expect to save \$475 annually, in moneys paid out for personal injuries, and property damages sustained by private individuals, and by the railroad company itself, because of accidents at the crossing in which the petitioner's trains or employees are involved. The total of these two items, \$14,528 per year, is offset, as the Commission's own figures show, by the increased expenses incident to depreciation and maintenance of the railroad-owned portion of the proposed structure, amounting to \$8611 per year. Thus the net annual benefit to the petitioner, after consideration of the savings in employee wages and all of the other factors, amounts to \$5917 annually, which is actually the figure shown by the Commission's own Exhibit No. 2, and agreed to by petitioner's representative in the proceedings before the Commission. (See p. 794 of the Commission's printed decision, and Exhibit 20; Appendix, pp. 29, 115-116).

### "Construction Cost Allocation"

#### Answer, page 7

In this portion of its answer the Commission asserts that it "found it to be in the interest of public safety, convenience and necessity to make the following cost allocations"; and thereupon quotes the cost allocation appearing at the conclusion of its decision and immediately preceding its formal order (Decision, p. 796; Appendix, p. 34). The [fol. 260] Commission's statement is not correct. The allocation was not stated to have been made *in the interest of public safety, convenience and necessity*. The Commission's formal finding in its decision, in which these factors are referred to, appears at page 795 (Appendix, p. 32), and is as follows:

"We hereby find it to be in the interest of public safety, convenience and necessity and that it would be practical to require the construction of a grade separation at the intersection of the Southern Pacific tracks and the Los Felix Road \* \* \*" (Emphasis added).

The finding as to the allocation of costs was completely separate and not related at all to the finding of the considerations that persuaded the Commission to approve the construction. It followed a discussion of the position of the parties on this point, and a statement of the Commission's own theory as to allocation. It will be noted that this finding also followed the Commission's erroneous statement that the proposed construction did not concern a state highway, a finding which its admission at page 5 of its answer shows to have been mistaken, as already pointed out.

After making this erroneous finding, the Commission rejected the benefit principle of cost allocation in grade separation proceedings, though without discussing the question at any great length; and thereupon simply said (at p. 796) that the cost should be allocated (one-half to petitioner, one-fourth to Los Angeles County, and one-eighth to each of the cities). The opinion contains no finding whatever showing the basis of the percentage figures employed in the allocation, nor even any reference to the methods by which they may have been derived; and no explanation has ever been offered or attempted, other than that these figures represent the Commission's own judgment. Instead, the Commission takes refuge in the position that its judgment and discretion cannot and must not be questioned; and as illustrated by numerous passages of its answer, resorts to abuse of the petitioner and criticism of its motives, because petitioner dares to question that judgment, and to assert that the determination should not prevail, unless some logical and reasonable basis therefor can be assigned.

The foregoing also serves to emphasize the distinction which petitioner makes between the Commission's conclusion and (ultimate) finding that the construction of the separation is justified on the basis of convenience to the motoring public, and the Commission's further and separate conclusion (which is not in the least a *finding of fact*) as to the proportions of the cost to be borne by the several parties. This distinction is of fundamental importance, for the primary reason (if for no other) that the former is not challenged; whereas the invalidity of the latter, as a matter

of law, is the very essence of petitioner's position before this Court.

Answer, pages 8-9

At these pages of its answer the Commission indulges in some rather pointed criticisms of petitioner; seeking to support these criticisms by what we regard as misrepresentations. Additional examples of the same type of argument are also found at page 18, and again at page 48, of the answer.

Thus, at the top of page 8 the Commission refers to a "novel and fallacious theory," assertedly advanced by the petitioner, that regardless of public safety and welfare, petitioner will not share in the necessary expenses incidental to grade separations, or other like highway improvements, unless the railroad derives a "readily calculable [fol. 262] direct monetary benefit or financial gain." Of course this is not at all an accurate reflection of the principle invoked by petitioner in the present proceeding. Petitioner merely asserts, on the basis of what it deems to be controlling constitutional principles, stated by highest authority and widely recognized elsewhere, that it should not be compelled to contribute to the cost of a facility constructed for the primary benefit of others, particularly where (as here) no substantial safety considerations are involved, except to the extent that it will fairly benefit from that construction. In other words, petitioner believes that it should not be compelled to pay for that which it does not receive; especially when others, many of them its competitors, will be the beneficiaries of that compelled payment. Certainly the fundamental principle that a private individual should not be required to pay out his funds, when he will receive no benefit commensurate with the expenditure, is neither "novel," nor "fallacious."

It is equally untrue that petitioner denies the obvious advantages expected to result from the proposed Los Feliz separation, or that it hopes or expects to escape from any obligation or responsibility resting upon it as a railroad common carrier operating in this state. Petitioner has stated without reservation, and states again, that it does not oppose, but on the contrary is willing to join in, the proposed construction at Los Feliz, and realizes that many



advantages will be secured to others thereby (as well as some rather modest benefits to itself); and insofar as such benefits do accrue to petitioner, petitioner is willing to pay its appropriate share of the necessary cost (see Exhibit 20; Appendix, pp. 115-116).

[fol. 263] Reference is made to the petitioner's interest in or ownership of certain highway common carriers, such as Pacific Motor Trucking Company, Greyhound Corporation, and the Railway Express Agency; and in this connection the Commission states that it finds difficulty in reconciling petitioner's interest in these highway operations with what the Commission characterizes as a "blanket repudiation of any and all concern in the public highways of this State."

This is simply one more misrepresentation of petitioner's position. There has been no "repudiation" of concern in the State's highways. On the contrary, petitioner believes and expects that its affiliated and subsidiary companies who operate on the State's highways should and will contribute to the cost of facilities such as this separation, constructed for their use and benefit. Petitioner favors and supports measures intended to insure that *all* highway users pay their fair share of the highway costs. These subsidiary companies presently pay all costs levied against them in respect to their use of the highways, through their license fees, taxes, and other levies imposed by the State and its sub-divisions; including where applicable taxes or other assessments imposed by the cities of Glendale and Los Angeles. Petitioner therefore believes that these companies, in common with all other companies and individuals operating on the highways, and particularly on Los Feliz, should and will be called upon to pay the major share of the expense of the separation, such payment being made in the same manner that all other contributions of highway users are made: i.e., through the agency of the public authorities which levy taxes upon them, and use those taxes for highway purposes.

[fol. 264] It should be emphasized, moreover, that the Commission has not sought to justify the proposed imposition of 50 per cent of the cost upon petitioner, because of the use of the highways by its subsidiary and affiliated or

related companies. The proposed imposition is to be placed upon petitioner as a railroad company, operating a railroad line; and the allocation is sought to be justified, apparently, because of the presence of the railroad as a hindrance to the free movement of motor vehicles on the roadway. We say "apparently," because neither the Commission's decision, nor its answer, contain any other explanation; whereas in both the necessity for the separation, *in the interest of free and rapid movement of automotive traffic*, is given major prominence.

Answer, pages 11-12

At these pages the Commission refers to certain of the evidence relied upon as supporting the decision to build the separation. It is to be noted that the Commission states that "Los Feliz is an important traffic artery—a natural important route;" and in connection with that statement refers particularly to the *congestion, delays and inconvenience* to the traffic using that road. This statement should be considered in connection with the Commission's prior admission (p. 5 of the Answer) with respect to the results of the congestion, when highway traffic is interrupted by the passage of a train at the grade crossing, in causing a "backlash" which adversely affects traffic on San Fernando Road (Highway 99) and thus also in connection with the Commission's erroneous finding (p. 795 of its Decision; p. 32 of the Appendix to the Petition) "that the proposed construction does not concern a state highway." [fol. 265] Immediately following this emphasis upon the elements of *congestion and resulting delay and inconvenience* to vehicular traffic, which would be greatly improved by the separation, the Commission refers (Ans., p. 12) to the accident record at the Los Feliz crossing. That record shows that with the present protection, by manually operated gates throughout the 24 hours of the day, there have been only 14 collisions between motor vehicles and trains at the crossing, over a period of more than 25 years, with 9 personal injuries and one death. While the Commission does not so state in its answer, the record indicates that the one death occurred when an automobile was deliberately driven through the crossing gates at high speed, and

into the side of a train. In this connection reference may also be had to the accident showing embodied in Exhibit 2 in the proceedings before the Commission, and reproduced at page 89 of the Appendix to the petition. That showing indicates that in 15 of the 26 years referred to, there were no collisions between trains and automobiles at Los Feliz crossing. In the years in which such accidents occurred (except for 4 in 1948), the maximum number in any year was one. The ten personal casualties occurred as follows: 2 in 1930, 1 in 1932, 1 (fatal) in 1939, 1 each in 1942 and 1943, and 4 in 1948.

The Commission shows, and the record bears out the statement (Appendix to the petition, p. 91) that the total motor vehicle movement over the crossing averages about 27,000 vehicles per day of 24 hours. The showing referred to is based on vehicle counts taken in 1949, 1950 and 1951. On this basis, the average frequency of accidents, with or without injuries, at the Los Feliz crossing, was stated in our [fol. 266] initial petition and brief (at p. 62) as being in the ratio of about 1 to every 1,750,000 crossings by vehicles. We are now advised that our earlier computation greatly overstates the actual hazard. Assuming an average daily movement of only 20,000 vehicles per day over the crossing, the actual likelihood of any vehicle being involved in a collision with a train at the crossing, based on the experience of the past 25 years, amounts to less than one in 13,000,000! The chance of personal injury to an occupant of a vehicle is even less. Assuming two persons in each vehicle, and again only 20,000 vehicles per day (although the counts show 27,000), the mathematical chance of a personal injury due to a collision with a train at the crossing, based on 25 years experience there, is less than one to 36,800,000.

The Commission suggests (Ans., p. 51) that our reference in our opening brief to the history of the accidents at the crossing, and our conclusion therefrom that the crossing is not potentially dangerous, is an "improper implication."

The fact is that the accident showing upon which we rely is contained in the Commission's own exhibit. It was offered for the specific purpose of showing whether there was a substantial hazard at the crossing, sufficient of itself to



justify the construction of the grade separation or amounting to a material factor in considering whether it should be built. It is not only customary, but essential, to rely upon experience to determine whether a particular situation or method of operation is hazardous, and if so the extent of that hazard. The statistical method of measuring hazard which was employed in our opening brief, and is again set forth above, is the customary and ordinary method of so [fol. 267] doing. Not only has it frequently been employed by the Commission itself, in its periodical reports and analyses, but it also has received the sanction of the Interstate Commerce Commission, which likewise publishes periodical accident reports; and more particularly, it has received the approval of the United States Supreme Court. Thus that Court, in *Retirement Board v. Alton P. Co.*, 295 U.S. 330, not only referred to statistical showings of this character as indicating the progress of safety upon the American railroads, but actually incorporated such showings in footnotes to its opinion (295 U.S., at p. 365). In *Southern Pacific Company v. Arizona*, 325 U.S. 761, statistical showings of the same character, presented by both the railroad and the State, were cited and relied upon by the Supreme Court, and were likewise referred to in footnotes annexed to the opinion (325 U.S., at pp. 778-779). In short, for the Commission to say that the lack of actual accident hazard to vehicular traffic at this crossing cannot be demonstrated by the statistical record which has been prepared by and in cooperation with its own staff, is to disavow its own standard practice, and to challenge methods which have received practically universal approval of all of the courts and other tribunals before which similar questions have been presented.

The fact stands out, beyond any possibility of challenge on this record, that *no justification for the proposed separation exists, on the basis of actual hazard at the crossing.* If any justification be found, it must reside in the elimination of inconvenience and delay to motor traffic using the roadway. There is no other basis or justification whatsoever. [fol. 268]. This is not to say that we do not regard the elimination of vehicular delay as an ample and adequate justification, or that we regard the record showing in this

respect as insufficient to support the Commission's conclusion that the separation should be built. But the very fact that the primary reason and purpose of the separation is to promote the rapid and uninterrupted movement of motor vehicles demonstrates that the "vehicular public" will be the principal beneficiary; and if the Commission's order apportioning the costs is permitted to stand, the petitioner, as a rail carrier, will be compelled to contribute for the benefit of such vehicular traffic, including many of its competitors, and to that extent to its own actual detriment.

The Commission's Decision No. 47344, in the  
Washington Boulevard Case

Answer, page 15

At this page the Commission refers to its own earlier decision No. 47344 (51 Cal. P.U.C. 771), which involved the reconstruction and widening of certain grade separations where Washington Boulevard in Los Angeles underpasses the tracks of the Atchison, Topeka and Santa Fe Railway Company. It will be noted that in that decision, which is cited in the text of the decision here under attack, the Commission asserted that its jurisdiction to apportion the costs required merely the exercise of its sound discretion, and referred to a number of earlier decisions of the United States Supreme Court. The Commission's present quotation omits any reference to the most recent decision of the Supreme Court bearing upon this issue: *Nashville, C. & St. L. R. Co. v. Walters*, 294 U.S. 405. However, that decision is discussed at length elsewhere in the answer; and the [fol 269] Commission's attempt to avoid its application to the case at bar will be discussed in that connection.

We point out here merely that the Commission's reliance upon the Supreme Court's decisions referred to in its own decision No. 47344 is reviewed at length in our petition at pages 37 to 44; and to save repetition we refer the Court to that discussion. We emphasize again, that in those cases the holdings of the Court were predicated primarily upon the point that *danger to the public* was involved, and that the separations in question were being constructed prima-

rily in the interest of public *safety*. The elimination of *delays to motor vehicles* using the public highways, to some extent as competitors of the railroad, was hardly even mentioned, if at all. The danger to the public at the crossings was the motivating factor. Obviously those cases have no application here, where the hazard to the public at the present grade crossing is shown by the Commission's own sponsored exhibit to be completely negligible.

### "Conflicting Contentions of the Parties"

Answer, pages 16-18

In this portion of its answer, the Commission undertakes to state the position of the petitioner but (as also occurs elsewhere in the answer) the Commission's attempted statement is far from accurate. It is not true that petitioner argues that the decisions of the Supreme Court, upon which the Commission has relied, are arbitrary, unreasonable and unconstitutional. Petitioner argues merely that they have no application in the case at bar, because the question which confronted the Commission, and is now before this Court, is entirely different, in that the element of hazard at the [fol. 270] Los Feliz crossing simply does not exist in a practical sense.

The Commission also asserts that there is no *logical* or *legal* basis for the contention that the cost of this grade separation should be borne by the parties in accordance with benefits to be received, nor are any such benefits mathematically calculable. A short and simple answer to this statement is that the benefit basis of allocating costs of grade crossings is now a *legal*, i.e., *statutory*, requirement, where Federal-aided highways are concerned: in that no railway involved in a grade-crossing project constructed in whole or in part from Federal funds may be required to contribute other than in accordance with the *net benefits* which it shall receive. The statutory provision (quoted at pages 35-36 of our petition) is Section 5(b) of the *Federal Aid Highway Act of 1944*, 58 Stat. L. 838-841. Whatever the Commission's opinion in the matter, apparently the Congress has been impressed with the propriety of the benefit principle; for this provision was not only enacted in



1944, but was extended in 1948, 1950, and again in 1952, and is still in effect. Moreover, similar provisions are contained in *General Administrative Memorandum No. 325*, issued in 1948 by the United States Bureau of Public Roads, the Federal agency charged with the duty of administering the Federal-Aid Highway Acts.

Additionally, statutes and decisions providing for the allocation of grade-separation costs on the basis of benefits are the law in several of the states: notably Michigan, and New York, by express statute; Florida, Nevada, New Mexico, New Jersey, Ohio, and West Virginia, by either statute [fol. 271] or practice (see pages 98 and 99 to the Appendix to our petition).

Finally, the benefit basis was adopted by the Commission itself, as early as 1933 in the so-called *Goshen Case* (January 16, 1933), 38 C.R.C. 380; and having been affirmed in the same year in the *Alto Overpass Case* (Decision 25811, April 10, 1933), 38 C.R.C. 606, thereafter became the controlling rule in this state for a period of about 18 years. Exhibit G of the Appendix to our petition (pp. 92-97) contains a listing of 108 grade separations constructed in California involving the Southern Pacific and two of its affiliated railroad lines (but not including the other railroads), showing the total cost, the apportionment of the cost as between the parties concerned, and the numbers of the Commission's orders whereby the construction and apportionment were approved.

It is true that in most of these cases the parties agreed that the railroad would not be benefited, and therefore should not contribute, and that the entire cost of the separation was to be borne by the other interested parties, usually the State Highway Commission or other public authority concerned. But it is likewise true that in at least some of the cases cited, where the railroad company bore a portion of the cost, the allocations were shared on the basis of respective benefits, and such allocation were approved by the Commission. Thus it will be seen that if there is no logical or legal basis for the benefit principle, as the Commission now contends, it would appear that the Congress of the United States, the Federal Bureau of Roads, the public authorities in several of the larger states, and last but not

[fol. 272] least, the Public Utilities Commission itself, for a period of about 18 years, have been proceeding without support of either logic or law.

Petitioner believes that both abstract logic, and the prevailing legal view, support its position that grade-separation costs should be borne by the parties in accordance with the benefits received, and that that principle should continue to prevail in California as it has in the past.

The statement that the benefits are not mathematically calculable is simply not true in this case: as is indicated by Part V of the Commission's Exhibit 2, reproduced at page 87 and following of the Appendix to the Petition. There appears on page 87 an actual calculation of the monetary benefits that would be expected to accrue from this separation. It is true that the author of the exhibit stated that it is not possible to determine with any fine degree of accuracy the *public* benefits that might accrue from the construction; but he did not then, nor did anyone else, challenge at all the accuracy of the calculation of the benefits which would accrue *to the petitioner*. Indeed, the Commission itself appears to concede (at pp. 793-794 of its printed decision; pp. 37-39 of the Appendix) that the value of these benefits has been properly calculated, with substantial accuracy. It will be noted that it does not challenge the figures, but simply rejects the benefit principle in its entirety.

We do not overlook, in this connection, the Commission's attempt (at p. 49 of its answer) to argue that the separation will confer upon petitioner certain benefits in addition to those entering into this calculation. This point is discussed in more detail hereafter. However, the Commission's present [fol. 273] position that the benefits are not mathematically calculable stands out in strange contrast to its position in the *Goshen* and *Alto* cases, *supra*, where the benefits were apparently readily susceptible to calculation, and in fact were determined to the satisfaction of all of the parties concerned.

At page 18 of its answer, in the course of this same discussion, the Commission after referring again to petitioner's alleged interest as a highway user, through the motor-truck operations of its subsidiaries and affiliated companies, describes petitioner's position in the present

case as an "astounding and unprecedented about-face in thus repudiating all prior performance in California grade separations of such priority concern."

This extraordinary statement is an outstanding example of the time-worn device of accusing the opposing party of tactics which the accuser has himself adopted and followed. The fact is, as demonstrated by our reference to the uniform policy of the Commission for the entire period since and including 1933, that petitioner is taking here the same position which the Commission, the petitioner, and generally the other parties in interest have taken, for a period of about 18 years. If "prior performance," in connection with California grade separations, is of any importance in the opinion of the Commission, then surely the petitioner is on solid ground in taking the same position here, as was taken by the Commission consistently ever since the decision in the *Goshen* case, and up to its decision No. 47344 (1952; 51 Cal. P.U.C. 771) in the *Washington Boulevard* case. There is no doubt that the Commission's action in this case, and the *Washington Boulevard* case, is both "astounding" [fol. 274] and "unprecedented," and that it constitutes a complete reversal and repudiation of its own prior performance in California grade-separation cases. The lengthy record of such performance (1932-1951) is too exhaustive and complete to permit any other conclusion.

At page 19 of its answer the Commission refers to the so-called *Nashville* case, also sometimes referred to as the *Walters* case; and already cited herein as *Nashville C. & St. L. R. Co. v. Walters*, 294 U.S. 405. The Commission says of this decision, "for which there is neither precedent nor other foundation in the established law of the land"; and, after intervening discussion which appears to have no particular bearing upon the present case, declares that the *Nashville* case is the worst selection that petitioner could have made in its "attempted reversal and overthrow of the now firmly established grade separation law of the land."

It is apparent that the Commission's conception of the "law of the land," in this connection, is simply that the Commission shall be free to exercise its unfettered and un-arbitrary discretion, based upon some undisclosed stand-



ard (if any), rather than definite considerations of the purposes of the construction and the resulting expenditure, and of the benefits which will be conferred, or any other concrete and consistent basis. Actually, if there be an established grade-separation law of the land (and petitioner firmly believes that there is), its principles are recognized in Section 5(b) of the *Federal Highway Act of 1944*, (quoted in full at page 35 of our petition), and in *Administrative Memorandum No. 325* of the United States Bureau of Public Roads; supplemented, of course, by the controlling principles adopted and followed by the United States [fol. 275] Supreme Court in the *Nashville case*.

### "The So-Called Nashville Case"

Answer, pages 19-25

In this portion of its answer the Commission discusses the *Nashville case* at length, in the attempt to show, *first*, that it is not authoritative, and *second*, that even if controlling as to the situation there involved, it has no application in the case at bar because of differences in fundamental facts. The *Nashville case* is discussed at pages 20 to 25 of our petition, and referred to in a number of passages thereafter. To save repetition, we ask the Court to review that discussion in connection with this reply.

The Commission first remarks (Ans., p. 19) that the *Nashville case* is no authority for the inference or contention by the petitioner that the law has now been changed, so that railroads are not now to be required to pay the cost of grade separations. The fact is that petitioner makes no such contention. Petitioner cites the *Nashville case* to the point that under the provisions of the due-process clause of the 14th Amendment to the Federal Constitution (which have not been changed), a railroad may not be compelled to contribute to the cost of a grade separation, *particularly where safety is not involved* (as in the present case) and the sole essential purpose of the separation is to promote the convenience and rapidity of movement of highway traffic, in any amount greater than the benefits which the railroad may reasonably expect to derive; in short that, as in

any other situation, an individual may not be compelled to pay for that which he does not receive.

[fol. 276] On page 20 of its answer, the Commission undertakes to list three asserted differences between the *Nashville case* and the present case. The first of these is, in effect, that in that case a statute was under attack which specified the exact amount ( $\frac{1}{2}$ ) to be assessed against a railroad involved in a grade separation; whereas here, so it is said, the statute confers discretion upon the Commission to allocate the costs, and does not purport to make an arbitrary assessment.

This statement demonstrates how completely the Commission misconceives the nature of not only the *Nashville case*, but also the present case. The petition here does not present a challenge to the State statute, but to an order made by the Commission, under purported authority of that statute, which order is asserted by the Commission to have the force and effect of a statute (Ans., pp. 41-43). The essential issue is whether such an order, not made directly by the legislature, but by a state agency acting under purported authority of the legislature, can be valid in the light of the protection afforded by the due-process clause, and the commerce clause, of the Federal Constitution, when the facts show that that order operates to take petitioner's property, and to devote it to the procurement of benefits for others, and to impose undue burdens upon the petitioner and thus upon the interstate commerce which it conducts. The *Nashville case* was decided under the due-process clause, the Court having held, in effect, that upon the special facts shown, the railroad's property was being taken from it arbitrarily, and without just cause or recompense. Petitioner asserts that the same principle applies to the case at bar.

In its second point, the Commission asserts that the claim of unconstitutionality in the *Nashville case* rested wholly [fol. 277] upon the special facts shown, and that the issue as to what portion of the cost should be borne by a railroad "in a grade separation such as we are concerned with in this proceeding" was not even an issue in the *Nashville case* (Emphasis ours.). This statement on the part of the Commission is equivalent to saying that the present case does

not resemble the *Nashville case*, because of asserted differences in the facts. Notwithstanding this assertion, the cases are quite similar in the essential and controlling facts, as more fully shown in our discussion in our opening brief. In particular, the petitioner's claim of invalidity of the challenged order rests, as did the claim in the *Nashville case*, upon special facts which demonstrate, and are not even challenged as showing, that in this case (as in that one) the railroad is being called upon to bear burdens wholly disproportionate to any possible benefits. In this case, as in that one, the main purpose of the proposed separation is the furtherance of the uninterrupted rapid movement of motor vehicles. As demonstrated by the Commission's own showing, the alleged hazard at the crossing is infinitesimal, and the separation could not possibly be justified from the safety standpoint. Thus in this case, the issue is whether a railroad may be compelled to pay large sums of money, not for the elimination of any hazard to which it is a party, but solely for the purpose of eliminating delay to motor vehicles and promoting their rapid and uninterrupted movement; and that precise issue was presented and decided in favor of the railroad in the *Nashville case*.

As its third attempted point of difference, the Commission asserts that the only point decided by the Court, in the *Nashville case*, was that the Supreme Court of the State had [fol. 278] erred in refusing to consider the special facts in that case and all that was done was remand the case for such consideration. It is also asserted that the Court did not even purport to determine that, under the special facts involved, it was unconstitutional to assess half of the cost against the railroad. Careful reading of the opinion discloses that the Court, in the *Nashville case*, held that the state court had erred in refusing to consider *and to give proper weight to* the special facts brought forward by the railroad, which demonstrated the absence of any material benefit accruing to it, and the consequent unconstitutionality of the fixed statutory imposition of 50 per cent, regardless of benefit. The case was remanded (p. 434) "for further proceedings not inconsistent with this opinion": which remand required the lower court to consider the case further,



in the light of the benefit principle set forth and approved in the opinion, notably at p. 430.

In short, in the *Nashville case* the State's action, which had been approved by the State court, resulted in imposing upon the railroad 50 per cent of the cost of the separation. Such action had been undertaken without regard to special facts showing that the benefits to the railroad did not justify that apportionment. In the case at bar the Commission, as a state agency, has made and now seeks to maintain an identical apportionment, for an identical purpose, and again without giving any proper consideration or material weight to special and undisputed facts showing that the benefits to the railroad do not justify that assessment.

At page 22, and continuing to the top of page 23, the Commission asserts that the *Nashville case* is "unique," and "no authority for the contention that the law has now been [fol. 279] changed so that railroads cannot be required to pay the cost of eliminating a grade crossing." After citing from the opinion, the Commission continues with the observation that the Supreme Court did not intend the *Nashville case* as reversing the long line of prior cases setting forth the railroad's responsibility in connection with grade separations.

The *Nashville case* is not in the least unique, in the sense apparently intended by the Commission. It is true that the *Nashville case* was apparently the first in which the Supreme Court was called upon to determine whether a railroad could be compelled to contribute as much as 50 per cent of the cost of a separation; where the principal or even the entire benefits would obviously accrue to the motor traffic using the separated roadway, and no substantial hazard existed requiring elimination. However, the *Nashville case* has been cited and followed as an authority, in a number of more recent cases. The listing of all of these cases would extend this brief unduly, but it may be noted that it has been cited and followed in California, by both this Court and the District Court of Appeal, in the following cases:

*Palermo v. Stockton Theatres* (1948), 32 C.2d 53 (62), 195 P. 2d 1;

*Perez v. Lippold* (1948), 32 C.2d 711 (737), 198 P. 2d 17;

*San Diego v. Van Winkle* (1945), 69 C.A.2d 237 (245), 158 P.2d 774.

It was also cited in the concurring opinion of Judge Wilbur in *San Francisco v. Market St. Ry.*, 98 Fed. 2d 628, 642. Other citations by state courts include: *Pa. R. Co. v. Driscoll*, 330 Pa. 97, 198 Atl. 130 (135); *Grasso v. Bd. of Adjustment*, 137 N.J. 630, 61 Atl. 2d 167 (169); *Elimination of* [fol. 280] *Spencer Crossing*, 5 N.Y.S. 2d 946, 254 App. Div. 412; *Elimination of Highway-Railroad Crossings*, 299 N.Y. Supp. 693 (702). It should be especially noted that the last two cases cited involved the apportionment of the expense of grade-crossing eliminations in New York, and the principle of the *Nashville* case was followed.

The essential point, which the Commission appears not to have understood or appreciated in its discussion of the *Nashville* case, is that the Court there made a distinction between its prior decisions (upon which the Commission currently relies: see its answer at pages 30-38, and our discussion of these same cases in our petition, at pages 38-43), upon the ground that in the earlier cases the essential question was whether a railroad might be called upon to contribute substantially to the elimination of a *dangerous* grade crossing over an existing street; whereas in the *Nashville* case, there was no question of elimination of hazard, but only of constructing a facility for the purpose of furthering the rapid and uninterrupted movement of highway traffic, much of it competitive with the railroad. It is true that in the *Nashville* case, as exemplified by the portion of that opinion set forth at page 24 of the Commission's brief, that the Court there recognized that where *substantial hazard* is involved (i.e., "*a dangerous grade crossing*") a railroad may be compelled to make a substantial contribution. But the Commission's quotation omits any reference to the preceding portion of the Court's opinion, where stress is laid upon the absence of any specific liability on the part of the railroad to contribute to the promotion of public convenience. There the Court said, in language quoted at length

in our petition (at pages 22 and 23); and here repeated for ready reference:

[fol. 281] *"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. Missouri P. R. Co. v. Nebraska, 164 U.S. 403, 41 L. ed. 489, 17 S. Ct. 130; Missouri P. R. Co. v. Nebraska, 217 U.S. 196, 54 L. ed. 727, 30 S. Ct. 461, 18 Ann. Cas. 989; Great Northern R. Co. v. Minnesota, 238 U.S. 340, 59 L. ed. 1337, 35 S. Ct. 753, P.U.R. 1915D, 701; Great Northern R. Co. v. Cahill, 253 U.S. 71, 64 L. ed. 787, 40 S. Ct. 457, 10 A.L.R. 1395, P.U.R. 1920E, 547. These were the authorities relied upon by this Court in Chicago, St. P. M. & O. R. Co. v. Holmberg, 282 U.S. 162, 167, 75 L. ed. 270, 273, 51 S. Ct. 56, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.*

*"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. Chicago, B. & Q. R. Co. v. Illinois, 200 U.S. 561, 592, 50 L. ed. 596, 609, 26 S. Ct. 341, 4 Ann. Cas. 1175. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Compare Hadacheck v. Sebastian, 239 U.S. 394, 60 L. ed. 348, 36 S. Ct. 148; Miller v. Schoene, 276 U.S. 272, 72 L. ed. 568, 48 S. Ct. 246. While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no bene-*



[fol. 282] fit, and indeed, suffer serious detriment; *St. Louis & S. W. R. Co. v. Nattin*, 277 U.S. 157, 159, 72 L. ed. 830, 831, 48 S. Ct. 438; *Memphis & C. R. Co. v. Pace*, 282 U.S. 241, 246, 75 L. ed. 315, 320, 51 S. Ct. 108, 72 A.L.R. 1096; *so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them.* *Myles Salt Co. v. Iberia & St. M. Drainage Dist.* 239 U.S. 478, 60 L. ed. 392, 36 S. Ct. 204, L.R.A. 1918E, 190; *Gast Realty & Invest. Co. v. Schneider Granite Co.* 240 U.S. 55, 60 L. ed. 523, 36 S. Ct. 254; *Kansas City S. R. Co. v. Road Improv. Dist.* 256 U.S. 658, 65 L. ed. 1151, 41 S. Ct. 604." (Emphasis added).

The language above quoted immediately precedes the excerpt upon which the Commission relies; and of course these two portions of the opinion should be read together, in order that the effects of the *Nashville case*, in its relation to the earlier decisions, may be fully understood. In this connection, the reader should also bear in mind that in the case at bar, as in the *Nashville case*, there is no question of elimination of a *dangerous grade crossing*; the Commission's own showing demonstrates that here the hazard is so extremely slight as not to require any consideration. The sole essential purpose of the proposed construction, exemplified again and again in the testimony, in the Commission's opinion, and now in its answer, is to promote the rapid and uninterrupted movement of traffic using the roadway, including that which uses the nearby state highway.

[fol. 283] "The Burden on Interstate Commerce"

#### Answer, pages 26-30

In this portion of its answer the Commission attempts to meet our showing that the challenged order imposes a burden upon interstate commerce, in violation of the Commerce clause. Apparently the authors of the answer did not understand our contention fully, or review the Supreme Court's decisions upon which we rely; for they appear to

treat this case as if the burden were claimed to arise because of a discrimination in rates, or as if we were contending that the result of the order would be to deprive petitioner of a *fair return* upon its property. The burden here is the same character of direct financial burden which was imposed by the Arizona Train-Limit Law, and condemned in *Southern Pacific v. Arizona*, 325 U.S. 761, already cited. There a direct burden of expense was imposed upon this petitioner, and the other major Arizona railroad, by reason of compelled observance of a state statute. The Court declared that direct expense to be wholly disproportionate to any safety benefit which might result from the enforcement of the state regulation: holding that the challenged law, viewed as a safety measure, afforded slight and dubious advantage, if any; while, on the other hand, its undoubted effect on interstate commerce was not only to destroy necessary uniformity of regulation, but also to increase the cost of the railroad operations, and impair their efficiency. The additional cost, as shown by the opinion (p. 772) was approximately \$1,000,000 a year for the two railroads involved; the findings by the trial court, adopted and approved by the Supreme Court (p. 771) having shown that the annual burden, upon this petitioner alone, was not less than about \$400,000 per year, [fol. 284] based upon the year 1939. It was because of the financial burden thus imposed which, as the Court said, had a seriously adverse effect upon transportation efficiency and economy, while affording at most *slight* and *dubious* advantages as a safety measure, that the Arizona Law was held invalid under the Commerce Clause.

The situation is the same in the case at bar. Here, if the order is allowed to stand, petitioner will be subjected to an uncompensated capital expense of \$628,260 equivalent, on an annual basis, to not less than \$31,413 per year. It may be argued that this burden is insufficient to justify resort to the Commerce Clause; however, it should be noted that in *Kansas City Southern v. Kaye Valley Drainage District*, 233 U.S. 75, and *St. Louis & San Francisco Ry. Co. v. Public Service Comm.*, 254 U.S. 535, the financial burdens imposed by the challenged orders of the state authorities were apparently even smaller; yet in both cases the orders were

condemned under the Commerce Clause. In the *Kansas City Southern* case the Court further pointed out that the imposition of direct burdens upon interstate commerce was not to be avoided, by simply "invoking the convenient apologetics of the police power." This comment is particularly pertinent, in view of the Commission's repeated references to the police power, and its constant argument that that power is virtually absolute, and unaffected by constitutional restrictions.

In the light of the foregoing, it is obvious that the Commission's citations of Supreme Court decisions at pages 26, 27, and 28 of its answer are immaterial to the Commerce Clause point. These cases involved, generally speaking, either attempted state regulations of intrastate rates at lower than interstate levels, or attempts of the states to [fol. 285] compel the continuance of unprofitable local service, where it was claimed that the resulting losses would constitute burdens upon interstate commerce. In such cases considerations of discrimination against interstate commerce might be involved. The instant case involves no question of discrimination, but simply the imposition of a direct financial burden which, to paraphrase the language of the Court in the *Arizona* case, affords at most only slight and dubious advantage when viewed as a safety measure, but does on the other hand impose a real substantial burden upon petitioner as an instrumentality of interstate commerce.

We note also the Commission's assertion (p. 28) that the petitioner is here contending for a trial *de novo* of the instant case. This argument seems to make its appearance in every brief recently filed by the Commission in a review proceeding, whether or not it has any bearing upon the case before the Court. In Subdivision III of this Reply (pp. 88 to 97) we deal at length with this contention; here we shall merely point out that the petition does *not* seek a trial *de novo*, but instead asks specifically (p. 9) that the Commission be required to certify to this Court *its entire record* in the proceedings in which its challenged order was made, and that the Court review *that record*, and thereupon annul and set aside the Commission's decisions. In short, petitioner asks only for the relief contemplated by the precise



language of Section 1760 of the Public Utilities Code: i.e., that in cases such as this, where rights are asserted under the Constitution of the United States, this Court shall exercise its independent judgment on the law and the facts, and the findings and conclusions of the Commission material to the determination of the constitutional question shall not be final.

[fol. 286] "The Weight of Judicial Decision \* \* \*

Clearly Supports the Findings \* \* \* of the Commission"

Answer, pages 30-41

In this portion of its answer the Commission discusses at some length the four Supreme Court cases which are cited in its Decision No. 47344 (51 Cal. P.U.C. 771), as having laid down the rule which the Commission here proposes to follow: namely, that it "is not bound to accept the benefit principle." These cases are reviewed at length in our Petition (at pages 27 to 44) and have also been discussed, in passing, in our preceding references to the *Nashville case*.

We emphasize again that in each of these cases, the essence of the decision was that where a *dangerous* condition existed at a grade crossing, the rail carrier might properly be required to bear a substantial portion, perhaps even the full cost, of a separation, *if the separation were required in the interest of public safety*. This is precisely the view of these cases taken by the Court, at page 430 of the opinion in the *Nashville case*. Indeed, all these cases are cited at that passage of the *Nashville* opinion, in either the text or the footnotes.

But these cases, because of their very emphasis upon the *safety* aspect, and the necessity for the elimination of *hazard*, obviously can have no application here. At the risk of further repetition, we point again to the fact that the Commission's own showing indicates, on the basis of 25 years experience, that the mathematical likelihood that any motor vehicle using this crossing will be involved in a collision with a train is about 1 to 13 million: in other words, completely negligible. In a practical sense, the safety argument simply does not exist in this case.

[fol. 287] The Commission's citations in this portion of

its answer include, in addition to the four Supreme Court decisions referred to, a Missouri decision rendered in 1934: *State ex rel. Alton R. Co. v. Public Service Commission*, 70 S.W.2d 57. Apparently the Commission overlooked a decision by the same court two years later: *State ex rel. Wabash R. Co. v. Public Service Commission* (1936), 340 Mo. 225, 100 S.W.2d 522. In that case the Missouri Court said:

"The City devoted a great portion of its brief to urging that the so called 'user basis' theory, or the theory of 'comparative use,' or of 'relative benefits' either to the railroads or the public, were not proper methods in arriving at a proper allocation of the cost. It insists that the extent to which the presence of the railroad at the point of crossing creates the danger and enhances the cost of elimination of the crossing is the proper basis upon which to apportion the cost. That theory may be proper in certain cases, where the only purpose of building a structure is a separation for the purpose of eliminating a dangerous crossing. The case under consideration, however, is peculiar in itself. Of all the cases cited in the briefs and in none that have come to our attention was there a situation, as we have here, presented to a commission or a court.

"Benefits which the various parties derived as the result of the project were of special importance in this case." (Emphasis added).

Thus like the Supreme Court of the United States, the Supreme Court of Missouri has affirmed the propriety of the benefit principle, particularly in cases where the safety element is not present or is relatively unimportant, and the special facts show that the expenditure would be for the primary benefit of others rather than the railroad.

[fol. 288] At pages 40 and 41 of the Answer, the Commission attempts to explain away its own action in approving and adopting the benefit principle in the *Goshen Junction* case, *supra* (38 C.R.C. 380). It will be noted that the Commission does not attempt to explain, and apparently cannot explain away, the *Alto* case of 1933 (38 C.R.C. 606, cited at pages 30 and 31 of our petition), or the long list of its orders approving and authorizing the apportionments of the costs

of grade separations, as between petitioner and its affiliated companies on the one hand, and the public authorities and other interested parties on the other, set forth in pages 92 to 97 of the appendix to the petition. It does include, at these pages, a portion, but only a portion, of its own Decision No. 29069, rendered in 1932 (and thus prior to the *Goshen Junction* case) and even emphasizes a portion of that quotation. However, a more extended quotation of the same opinion appears at page 57 of our petition; and we call attention to the following significant language from that decision now omitted by the Commission:

*"There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."*  
(Emphasis added).

In the case at bar the vehicular public will receive all but a very modest proportion of the benefit from the construction of the Los Feliz separation; and, to use the Commission's own phraseology, in a decision upon which it now purports to rely: "it logically follows that this class of the public should bear a greater portion of the cost." Certainly, to follow out the former thinking of the Commission still [fol. 289] further, the railroad should not have to bear any greater portion of the cost, than is justified by the benefits which it will realize.

### "Presumption of Validity"

#### Answer, page 41

The Commission's argument that its decisions are supported by a strong presumption of validity is wholly meaningless in the case at bar, particularly in the light of the express provisions of Section 1760.

Moreover, since the Commission's findings on two vital points (the involvement of a state highway, and the formal mention of safety as one of the grounds supporting the necessity for the separation) are shown by its own answer to be contrary to the record and therefore erroneous, even



the *prima facie* presumption contended for in the argument is swept away.

The decisions cited by the Commission at this portion of its brief do not support the proposition that the Commission's determination carries any presumption of validity under the Federal constitution. There can be no presumption that the Commission, in the exercise of an asserted legislative function, has reached a correct legal decision upon questions of constitutional law.

**"This Court May Not Substitute Its Judgment for  
That of the Commission"**

Answer, pages 43-44

The argument under the foregoing caption is likewise beside the point at issue in this case. Petitioner's challenge is not addressed merely to an alleged erroneous exercise of judgment by the Commission; nor is it contended that on the facts the Court should substitute its discretion for that of [fol. 290] the Commission. It is contended, rather, that the Commission did not give any weight to the uncontested facts before it, and consequently did not observe constitutional requirements in arriving at its conclusions in its decision here under challenge. The question is as to the Commission's failure to observe express constitutional limitations: i.e., the prohibitions upon the deprivation of property without due process of law, and upon the imposition of direct and undue burdens upon interstate commerce implicit in the Commerce Clause. This Court is therefore not asked here to decide whether, in the circumstances, the Court would reach the same conclusions as the Commission or if not, what result it would reach; but rather to decide whether the Commission, *on the facts* as shown of record, may order the petitioner to pay out large sums of money for a facility which will bring about substantial benefits to others, but only relatively slight benefits to itself; and whether the Commission may, in so doing, impose a relatively heavy burden of expense upon a carrier's facilities employed in interstate commerce, where at best the improvement in safety will be slight and dubious.

**"Petitioner's Alleged Interest in Highway Operations"****Answer, pages 47-50**

In this portion of its brief the Commission repeats its reference to the petitioner's ownership of or interest in Pacific Motor Trucking Company, and other companies which operate motor vehicles upon the highways of this state. The Commission also makes the rather extravagant statement that petitioner operates or controls the largest and most important common-carrier motor-trucking stage-express and related services in the state, and therefore has [fol. 291] greater concern in the public highways than any other carrier.

While it is true that petitioner owns or entirely controls both Pacific Motor Trucking Company and Pacific Electric Railway Company, it has only a minority interest in Pacific Greyhound Lines, and Railway Express Agency, and does not control either. To that extent, the Commission's statement is quite erroneous. Insofar as any of these companies operate upon the highways of this state, they are, of course, required to pay the full scale of the fees, taxes, and other charges imposed upon highway motor carriers. Petitioner has no present objection to these impositions upon its subsidiaries, and would have no objection if they were increased, as a result of increases in all taxes, fees, and other charges of *all* motor carriers operating for hire or profit, to the point where all such motor carriers would pay amounts equivalent to the full value of the use which they make of the public highways. Included in such contributions from motor carriers, including *all* motor carriers whether owned by or affiliated with petitioner or not, should be whatever amounts are necessary to pay for the benefits received by them from highway improvements, including highway separations such as Los Feliz. In short, petitioner recognizes and urges that the benefit principle be applied to these motor carriers not solely with respect to grade separations, but with respect to *all* of the highway facilities they use. Consequently there is no inconsistency in petitioner's position that, *as a rail carrier*, it should not be called upon to contribute except in proportion to the benefit that it might realize. Far from being illogical in our contention, as

the Commission appears to argue (p. 48), we believe that [fol. 292] we are completely consistent in taking the position that all parties that may use and benefit from the Los Felix separation should participate in the cost accordingly. Our objection is to the imposition of charges or assessments upon petitioner's rail operations and services, which should be assessed against the truck, bus, and other motor vehicle operators (including its own subsidiaries) who are primarily benefited.

At page 49, the Commission recites some twelve alleged benefits which, according to its argument, will accrue to petitioner from the Los Felix separation and which, so the Commission says (Ans., p. 48), petitioner has "flatly refused to consider," although they were allegedly "obvious." In this connection, the Commission also refers to the "dangerous" Los Felix crossing: this in spite of the fact that its own evidence (cited in its Answer, at p. 12) shows that over a period of 25 years the so-called "danger" to automotive traffic has been virtually non-existent, because of the efficient protection afforded by the petitioner.

Of the twelve alleged benefits listed on page 49 of the answer, numbers 1, 5 and 6 relate to the alleged elimination of hazards on the tracks, causing accidents and personal injury suits, and serious damage to railroad equipment. The fact is that allowance for the benefits which might be realized from the elimination of accidents, including all expenses incident to such accidents where borne by the railroad, is included in the figures reflecting the benefits which the railroad will realize from the construction of the crossing. Specifically, the Commission's Exhibit 2, reproduced at pages 86 and following of the Appendix to our petition, contains a tabulation, reproduced on page 89 of [fol. 293] the Appendix, which shows the amounts paid out by the railroad on account of property damage over the 25 years and 3 months for which the accident record was studied. These figures entered into the average figure of accident and damage payments, amounting to \$475 per year, shown in the tabulation at page 87; and this tabulation is also reproduced in the decision under attack. This figure includes, of course, payments to individuals on account of personal injuries, as well as payments on account



of property damage. This figure is a part of the total gross annual cost of \$14,528, which would be eliminated as a railroad expense, if the separation were constructed. Thus items 1, 5 and 6 have been considered, and the financial benefit accruing therefrom has been included, in petitioner's (and the Commission's) calculation of its benefits, and petitioner's showing of the resulting proper contribution to be made by it. (Ex. 20; Appendix, p. 116)

Item 2 of the Commission's list relates to certain savings allegedly resulting from the relief from the operation of crossing gates. The amounts saved as a result of the discontinuance of the operation of crossing gates, including both the maintenance of the gates and the wages of the watchmen, is included in the item of \$14,053, shown in the tabulations on pages 87 and 115-116 in the Appendix of our opening brief, and repeated in the challenged decision. See also pages 273-274 of the Reporter's Transcript, and Exhibits 2 and 20. As to switching operations, the evidence is uncontradicted that no saving would result (Rep. Tr., pp. 266, 411). Thus Item 2, to the extent that any benefit would be realized, is likewise included in the gross figure reflecting the financial benefits which petitioner will receive from the construction of the separation.

[fol. 294] Item 3, as listed by the Commission, is stated to be "improved drainage of right of way in the vicinity of the crossing, and relief of flood conditions at the depot grounds." The same contention is also made by the Cities (Cities' Br., p. 48).

An examination of the record (Rep. Tr., p. 317) will show that the evidence directly contradicts the Commission's claim, and demonstrates in fact that the construction of the separation would have no effect at all in improving the drainage of petitioner's right of way, or cause any reduction of alleged flood conditions at Glendale depot. In fact, flood conditions at the depot are seldom of serious consequence, and are already adequately taken care of.

Item 4 is the alleged easier accessibility of Glendale depot to patrons coming from the Hollywood area of Los Angeles. The evidence (Rep. Tr., pp. 321-322) shows that the proposed separation, instead of providing easier access to the depot, would make such access more difficult for

patrons coming from the Hollywood area. They would have more distance to travel, and would have to use more congested streets to the north and east of the depot, instead of using a roadway (Railroad Ave.) adjacent to the tracks east and south of the present Los Feliz crossing.

Item 7 of the Commission's list is stated to be "increased length of trains over the present 90 to 100 cars." The same item is also referred to in the Cities' Brief (at p. 44). Here again there is no showing that the existence of the present grade-crossing prevents the operation of trains longer than 90 to 100 cars, or that construction of the separation would permit such operation where it does not now take place. On the contrary, the evidence shows [fol. 295] that for other reasons, principally the maximum capacities of the passing tracks on the districts north and west of Los Feliz over which the trains must run, trains of more than 100 cars cannot readily be operated (Rep. Tr., pp. 243-244). Furthermore, even when the separation is built, there will still be several grade crossings within a short distance both east and west of Los Feliz; and if the presence of grade crossings can be said to have any influence upon the length of freight trains in this particular territory (which is at best exceedingly doubtful: Rep. Tr., pp. 260, 265-266), the elimination of only one of these cannot possibly have any material effect.

The 8th item on the Commission's list is alleged greater freedom, if not profit, in all switching operations. Here the evidence indicates (Rep. Tr., pp. 258, 266, 411) that the construction of the separation will not produce any economic savings in respect to switching operations, and that no tangible benefit can possibly result in this particular.

The 9th item in this list is the alleged opportunity for temporary storage of trains up to 90 cars in length. This item is also referred to by the Cities in their Brief (pp. 44-45). Here again the evidence not only fails to support the alleged benefit, but instead is squarely to the contrary (Rep. Tr., pp. 244-245, 247). In point of fact, there would be no occasion whatever for petitioner to store trains of this length in this particular location. It should be borne in mind that this is a double-track main line, with two short adjacent yard tracks which are in constant use. Trains

cannot be stored upon tracks which are in continual use for the movement of trains and cars. To do so would be to "tie the railroad up" completely on the two districts which [fol. 296] come together at Burbank Jct., a short distance north (west) of Los Felix.

Item 20 is the alleged advantage of new structures and consequent longer life. The evidence shows that instead of being a monetary *advantage*, the presence and consequent necessary maintenance of the new and more elaborate structure would be a source of expense. Again the Commission's own Exhibit No. 2, in the tabulation reproduced at page 87 of the Appendix to our petition, and reproduced also in the decision under challenge, shows that the annual depreciation on the new structure would be \$6991 per year, a charge which is not now incurred; and that the annual cost of maintenance, excluding of course the track which would be the same as at present, would be \$1620. These will be added expenses, totaling \$8611 per year, which must be offset (and in fact were offset by the Commission's own engineers) against the monetary savings accruing to petitioner, because of elimination of the crossing gates, crossing watchmen, and the slight annual expense assigned to accident damages at the crossing.

Numbers 11 and 12 of the Commission's list are, respectively, benefits from streets as "feeders" for this petitioner, and benefits from improved goodwill. These items are also cited in the Cities' Brief (at pp. 45-46, 48). There is no evidence that there will be any improvement in the streets which serve as feeders to this petitioner, except to the extent that Los Felix itself will become an improved highway, over which motor traffic may move with less delay and less possibility of congestion. Other streets in the vicinity of Los Felix will be to some extent obstructed (Rep. Tr., pp. 321-322). If these are the streets allegedly [fol. 297] serving as "feeders" for the petitioner, petitioner will be disadvantaged rather than otherwise. Actually there is no evidence whatever to show that any of the streets which may be affected by the separation serve as feeders for the petitioner, or that if they do the improvement will increase the petitioner's traffic.

As to the improved goodwill, there is no evidence what-



ever. Certainly it is highly questionable whether any substantial improvement of the public attitude toward the petitioner would result. Even assuming this to be true, however, the argument reduces to the contention that the petitioner can be compelled to spend \$628,000 of its funds, to purchase the goodwill of the public as represented by the 27,000 or more motor vehicle operators who daily drive over the present crossing.

We cannot refrain from observing that the Commission's attempt to argue that these alleged benefits will be conferred upon petitioner represents a rather strange but, so far as petitioner is concerned, completely welcome (and correct) attitude on its part. In a sense, the Commission is again taking the same position which was taken by it over the long period between 1932 and 1951 when it accepted and applied the benefit principle, without exception, to all grade-separation proposals in which this petitioner was involved. In view of the Commission's attitude elsewhere in the answer it seems strange that it should try to justify its judgment, in the decision here under challenge, by citing the various alleged benefits which, as it contends, the petitioner will receive. We agree of course with the Commission's clear, though apparently reluctant, recognition that the consideration of benefits is of material importance, and [fol 298] should be controlling. Accepting the principle, the only remaining question would be whether the benefits cited by the Commission on page 49 would in fact accrue, and if so, would justify the imposition upon the petitioner of one-half of the cost of the separation. Our analysis above shows that while some of them would accrue, they have already been taken into consideration in calculating the benefits which petitioner would receive and is willing to pay for; that others would not accrue, and that in fact no showing could be made to support such a contention.

But even if every one of these benefits could be realized, obviously the sum total of their value could not possibly approximate the expense sought to be imposed upon petitioner. The object and result of the separation would still be primarily to provide a better roadway for motor vehicles, and to promote their free and rapid movement, with greater freedom from delay, congestion and interference.

On this point the record is clear; and nothing stated by the Commission in either its decision, or now in its answer, argues in the least to the contrary.

We note the Commission's citation, at page 50 of the answer, of *City of Oakland v. Schenk*, 197 Cal. 456, to support the statement that the railroad has a continuing obligation to participate in the matter of constructing and maintaining *reasonable and adequate* crossings over its tracks. The decision was rendered by this Court in 1925, and involved merely the question of compensation to the railroad for a right of way or street which had been constructed across its tracks. The only issue was whether the railroad should be compensated for the incidental expense of filling between the tracks, and for two feet outside, and [fol. 299] for other crossing charges incidental to the building of the street. The Court said (at p. 463):

"The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved whenever it becomes necessary for the protection of life and property." (Emphasis added).

This portion of the decision, particularly the italicized language, makes it clear that the obligation to participate in the construction or alteration of a crossing over a railroad company's tracks arises when changes are necessary for the protection of life and property. In the instant case, it cannot possibly be argued that the change is shown to be necessary for that reason. Certainly a gross expense of approximately \$1,500,000, or the imposition upon the railroad of a direct contribution of nearly \$750,000, could not possibly be justified for the purpose of eliminating accidents which have occurred on the average of about one in every twenty months, or personal injuries which have occurred on the average of about one in every thirty months. So far as safety of life and property is concerned, the protection now afforded at the Los Feliz crossing, by means of gates and crossing watchmen, is completely *reasonable and adequate*. The very use of these words ("reasonable," and

"adequate"), in the Commission's reference to the cited case, shows that the public authority is not vested with unrestrained discretion in imposing requirements upon the railroad company, but can only act within the limits implied by those descriptive words.

[fol. 300] "Petitioner \* \* \* Has Gone Completely

Outside the Record \* \* \*

Answer, pages 50-52

In this portion of its answer the Commission criticizes petitioner's reference to the study prepared by the Stanford Research Institute entitled, "The Railway-Highway Grade Crossing Problem"; asserting that the study was not in evidence in the record before the Commission, and that in making this reference petitioner "has gone far afield," and resorted to "borrowing outside railroad propaganda \* \* \*." The Commission's intemperate criticisms are themselves sufficient warrant to justify the Court in making a close examination of the Stanford Research Institute study. Far from being merely "outside railroad propaganda," the study is a carefully prepared and comprehensive review of the entire problem, compiled by an independently supported and highly competent research organization, operating as we understand under the auspices of Stanford University. This study is available in a great number of public libraries, notably the San Francisco Public Library, and is entitled to the same respect, and authoritative force, as would be accorded to any other recognized work duly prepared by a body of experts, and freely available for the consultation of all who are concerned with the problem under review. It may be added that this study was not published and available when the hearing in this case took place, and hence could not have been included in the record.

We have quoted from the study, because we believe that the presentation of facts and conclusions therein is not only directly material (which of course the Commission does not question), but also cogent and persuasive on the very points with which this case is directly concerned. We have pre-[fol. 301] ferred to use quotation marks in presenting this material, in order not to be accused of plagiarizing. How-



ever, if there should be in the mind of the Court any infirmity in this particular, because the material is quoted rather than set forth as our own presentation, we have no hesitation in assuring the Court that we endorse, adopt, and reaffirm all of the material taken from the study, with the same effect as if it were of our own authorship.

The Commission likewise complains of our reference to General Administrative Memorandum No. 325 of the United States Bureau of Public Roads, apparently because likewise this document was not in evidence before it, in the original proceedings. Certainly Memorandum No. 325 can hardly be characterized as "outside railroad propaganda." It is a public document duly issued by a bureau of the Federal Government, pursuant to authority of a Federal statute. It is unquestionably a matter of judicial notice, which may properly be brought to this Court's attention for such value as it may have here. In this connection, it may be noted that the Cities of Los Angeles and Glendale, at page 39 of their brief, have quoted from Memorandum No. 325, and apparently find no grounds to criticize our own reference.

We have already noted the Commission's reference (p. 51 of the Answer) to the statement at page 37 of our petition, in which we discussed the Commission's admittedly erroneous finding (p. 795 of the decision; Appendix p. 32) that the proposed construction does not concern a state highway. We there suggested, and we now renew the suggestion, that this finding was made in the face of the positive testimony referred to by the Commission itself (at p. [fol. 302] 5 of its answer: i.e. the creation of the so-called "backlash" on Highway 99, San Fernando Road), so as to avoid any possibility that the State Department of Public Works might be called upon to contribute to the cost of the separation. This suggestion is entirely justified by the Commission's own statement, in the same sentence in which the erroneous finding is set forth, reading: "accordingly, the Department of Public Works of the State of California is not directly involved." We have also suggested, and we again renew the suggestion, that the sole and only purpose of this incorrect finding was to avoid any possibility that the railroad's contribution would be limited to the 10 per cent maximum provided by Administrative Memorandum

No. 325, because of the fact that a contribution by the State Highway Department would involve the possible use of Federal funds.

It will be noted that in its discussion at page 51 of its answer, the Commission, while asserting its alleged "indignation," *does not deny* that the finding was made in the face of positive and uncontradicted testimony, *does not deny* that it was for the purpose of avoiding any contribution by the Department of Public Works, and *does not deny* that the overall purpose was to avoid any possibility that Federal funds would be involved and its own imposition of expense upon petitioner thereby invalidated, to the extent that it is greater than 10 per cent.

On page 51, also, the Commission criticizes our reference to what it admits are "the relatively few accidents over the last 25 years," stating that we *imply* that the crossing is not potentially dangerous, and that our *implication* is "improper." Apparently the Commission does not fully understand [fol. 303] stand our position in this respect. We do not in the least mean merely to *imply* that the hazard of collisions between motor vehicles and trains at the crossing is slight; we assert that this is a positive fact, determined by practically a generation of actual experience. In this connection, moreover, we emphasize again that there is no actual claim that the construction of this separation is necessary in the interest of eliminating hazard, or because of any substantial danger at the crossing. While the word "safety" is used casually in the Commission's opinion, there is no actual finding that this separation is necessary for any definite reason grounded in safety. Nor does the Commission in its answer anywhere contend that safety considerations have any material bearing in the present case.

### "Summary"

Answer, pages 52-55

In this portion of its answer the Commission undertakes to summarize in general language the preceding argument. Substantially all that is said in the summary which merits comment has already been discussed above, and further treatment would be largely repetitious. We note, however,

the citation of one additional case: *Pa. etc. Lines v. Board of Public Utility Commissioners* (1951), 81 A. (2d) 28, 33; 82 A. 2d 774. This case is cited to the proposition that a railroad, when accepting privileges granted in its charter, must be deemed to have taken into account expenses which might thereafter be incurred, by order of the Public Utilities Commission compelling the necessary installations for its safe operation at public highway crossings. Obviously the case has no application here. Petitioner has already provided all the installations needed in order to insure the [fol. 304] safety of automotive traffic at the Los Felix crossing. As already stated, not even the Commission, despite its general tendency in its answer to use extravagant expressions, has had the temerity to argue that there is any actual and demonstrable hazard to motor vehicles at this crossing. The record of the past twenty-five years, contained in the Commission's own exhibit, is conclusive to the contrary.

We note, at the foot of page 55, two paragraphs which require additional comment. In the paragraph commencing on line 17 of this page, Petitioner is accused of being highly inconsistent, in disclaiming numerous benefits and advantages which would accrue to petitioner and its subsidiaries from the Los Felix improvement. This is a complete and apparently gratuitous misrepresentation of our position. We have *acknowledged* (not disclaimed) the benefits which the record shows that petitioner would receive from the separation, and are prepared to contribute in proportion to those benefits. We have likewise acknowledged that the affiliated and subsidiary companies of the petitioner would, as highway users by motor vehicle, be benefited by the separation, and that they will participate in the expense, in the same manner, and to the same extent, as other motor-vehicle users of the roadway.

In the concluding paragraph, commencing on line 21 of page 55, the Commission refers to our petition as an "attack upon the existing laws and the Constitution of California" (which obviously it is not), and states that its purpose to "stymie, through prolonged and futile negotiations, any and all future grade separation relief and thereby escape any monetary or other payments whatsoever."



[fol. 305] As indicated, our petition is not an attack upon any existing statute or constitutional provision of this State, nor is it directed to any order of the Commission except the orders here in suit. It is not intended to have and need not have any effect of delaying the construction of the Los Feliz separation. Although our petition contains a general request for a stay of that portion of the order requiring the payment of money, we have not asked that the order be otherwise stayed, and particularly have not asked that the construction be delayed. In this connection it may be noted (as indicated at the outset of this Reply) that such a request was made, on behalf of the City of Glendale; and that that request was granted by the Commission without objection by petitioner, or indeed any expression on our part. So far as concerns our attitude, generally toward grade-separation construction, reference may be had to the list of 108 grade-separation projects in which this company and its railroad subsidiaries participated, over the period 1933 to 1950, which appears on pages 92 to 97, inclusive (6 pages) of the Appendix to our petition.

Finally, we call attention to the express statement, in the Foreword to our brief supporting our petition (p. 14), to the effect that we have not opposed and do not presently oppose the construction of the Los Feliz separation; and to the further statement, in the conclusion (p. 94), that the issue here is not whether the separation should be built, but solely as to the allocation of the costs.

These attempts of the Commission to misrepresent petitioner's position and to attribute improper motives to petitioner appear in varying language in more than one passage of the Commission's answer. This technique might be [fol. 306] tolerated in a union election contest, or a waterfront rally; it might even be understood when employed on behalf of communist defendants in a criminal trial, where disrespect is often called upon to serve in place of evidence or argument; but it has no place in the sober consideration of constitutional questions such as presented here. It is particularly inappropriate that a constitutional body, such as the Public Utilities Commission, set up as the agency of the State of California and representing all of the various interests in this State, including the petitioner as one of

its major industries, should resort to the tactics here employed. In any event, and whatever the motives of the petitioner may have been, it is entitled like any other citizen to assert its constitutional rights before this Court, and to obtain from this Court a fair and reasonable adjudication of constitutional issues fully and fairly presented, without any question being raised as to its motives or purposes which may have impelled it to resort to its constitutional privilege.

### "Conclusion"

Answer, pages 56-57

Here again the Commission resorts to a complete misrepresentation in order to support its argument. It refers first of all to our theory of this case as a "rail profits theory." Of course, this is merely the use of an epithet, there being apparently in the minds of the authors something wrongful or invidious in the very thought of "profits." However, the benefit principle is not simply a profit theory, but is a complete exemplification of the fundamental principle, declared in the due-process clauses of the [fol. 307] Federal and State constitutions, that a private individual cannot be *compelled* by the State to pay out his funds, except to the extent he may receive a fair consideration in return. Certainly the adoption of the benefit principle, in the present case, would not be a "perversion of grade-crossing regulation" as it exists and has existed in California. On the contrary, it would be merely a continuance of a consistent policy and practice which was initiated by the Commission as long ago as 1932, and has been followed ever since up to a recent date. It can hardly be said that a policy which was so uniformly followed, with such apparent and obvious concern for the public interest, and the interest of all private parties involved, was "a sham and a delusion." If so, not only this Commission, but the Congress of the United States, the Bureau of Public Roads, the Supreme Court of the United States in the *Nashville* case, and the public authorities of many of the other states, are all in the position of having labored under a delusion and operated under a sham for many years.

At page 57, the Commission again raises the purely fictitious issue that the petitioner is here seeking to "relitigate in the courts factual questions \* \* \* herein determined by the Public Utilities Commission." The fact is that we are not seeking to relitigate this case at all, but only to have it determined by the Court, in accordance with Section 1760 of the Public Utilities Code, *upon the record made before the Commission*; furthermore, that there are no substantial issues of fact, except for the Commission's erroneous finding with respect to the involvement of a state highway, as to which the answer now apparently concedes that the Commission erred. This is a case in which the essential [fol. 308] *basic facts* are undisputed, and the only questions which arise are questions of law upon those facts. The Commission's attempt to characterize this case otherwise is completely without foundation.

"The Recent Action of This Court in S.F. 18671, December 11, 1952, *The Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission*"

Answer, pages 57-58

At the very conclusion of its answer, the Commission refers to the action of this Court on December 11, 1952, denying the petition for writ of review in S. F. No. 18671, *The Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Commission*. It is asserted that that action is decisive of the present case.

In No. 18671, the petitioner challenged the validity of the Commission's decision No. 47344, already discussed herein, which involved the widening of certain underpasses at the point where Washington Boulevard in Los Angeles crosses the main line and a branch line of the Santa Fe. That case differed from the case at bar in at least two important respects. In the first place, the proceeding involved the widening of existing underpasses, which had previously been constructed on a cooperative basis, with the railroad contributing a substantial portion of the expense. It may well have been that this Court simply regarded Decision No. 47344 as in furtherance of that individual pattern, and for



that reason concluded not to review the Commission's action.

In the second place, the Commission had found in Decision No. 47344 that the construction there involved was [fol. 309] primarily to meet local transportation needs, and thus by inference at least that no state highway was involved, even indirectly. In the present case, it is effectively shown, by undisputed evidence, and as already stated, in effect admitted by the Commission (p. 5 of its answer) that the proposed construction would have a direct and substantial effect upon traffic congestion upon the nearby state highway, and that one of the principal benefits of the separation would be the elimination of this congestion and consequent greater freedom of movement on the highway.

We consider that this Court's later action in S. F. No. 18667, *Southern Pacific Company v. Public Utilities Commission*, in which the Court, as of January 5, 1953, has granted the petition of this petitioner to review the Commission's decision No. 47161, is even more directly pertinent to the case at bar. In that case the challenged order purports to require petitioner to continue to operate a pair of mid-day trains between Oakland Pier and Sacramento, and to substitute Budd-diesel cars for the present steam-operated conventional locomotives and passenger cars; this in spite of a showing that the present operation entails an annual out-of-pocket loss of more than \$100,000, due principally to lack of patronage, and that the diesel-car operation, in addition to involving an initial investment of \$150,000 per car more, could not be expected to do more than reduce the out-of-pocket loss to about \$20,000 per year. Essentially, that case involves the same fundamental question as the present case: namely, whether the Commission, in the exercise of its so called police power, and regardless of the limitations of the commerce and due-process clauses [fol. 310] of the Federal Constitution, may order a railroad carrier to expend large sums of money for which no compensating return by way of benefit or other consideration will be realized. Moreover, the Commission in that case presented substantially the same arguments as in the present case; including, in its answer to the petition, even some

of the same extravagantly critical language which appears in its present answer. Many of the sub-divisions of the Commission's answer in that case have been repeated in its answer in the present case, largely without any change of the language or the citation of cases relied upon. Compare, for example, sub-division II of the answer in that case, repeated at page 41 in the answer in the present case; sub-division III of that answer, repeated in substance at pages 41-43 of the answer in the present case; sub-division IV of that answer, repeated in substance at pages 26-28 of the answer in the present case; sub-division VII of that answer, repeated at pages 28-30 of the answer in the present case; and sub-division IX of that answer, repeated at pages 43-44 of the present answer. In view of the fact that the Commission has considered that the basic issues in these two cases are so nearly identical, which view we naturally share, we urge that the Court should take the same favorable action as in S. F. No. 18667, and should not feel bound by the denial entered in No. 18671, the *Santa Fe* case.

## II

### Reply to the Answer and Brief of the Cities of Los Angeles and Glendale

A. The answer and brief of the Cities, in the discussion of "Evidence" (Cities' Br. pp. 5-7) states:

[fol. 311] "The evidence as summarized by petitioner in its brief (Petition, pp. 104-115) is quite comprehensive; however, certain additional evidence should be noted, and other evidence emphasized." (Cities' Brief, p. 5)

Petitioner submits that the Cities have not fairly commented on the evidence. Instances of improper comments or summarization by the Cities are as follows:

#### (1) It is stated in the Cities' Answer and Brief:

"There was no evidence that vehicles using the street were in competition with the railroad." (Cities' Brief, p. 6)

The competitive nature of the Los Felix traffic was pointed out at page 53 of the petition, with appropriate references to the evidence. This Court takes judicial notice of main lines of railroads, such as petitioner's (20 Am. Jur. 109-10, 23 Corp. Jur. 66; and cases cited) and the nature of the business, both passenger and freight, conducted thereon, as well as the competitive nature thereof (20 Am. Jur. 108-109; 23 Corp. Jur. 66; 31 Corp. Jur. Sec. 690-691; and cases cited). The evidence is that the vehicular traffic using Los Felix goes to points served by petitioner (Rep. Tr., p. 30); that is, over highway routes competitive with petitioner. The uncontradicted evidence is that a substantial volume of vehicular traffic originating or terminating in the metropolitan area of Los Angeles uses Los Felix en route to Antelope Valley and the Palm Springs area (Rep. Tr., p. 30, lines 9-18), both of which are served by petitioner's rail lines. Los Felix is also used to reach U. S. Highway 99 (San Fernando Road) and State Route 40 leading to the [fol. 312] interior valleys (San Joaquin and Sacramento Valleys) in California (Rep. Tr., p. 30, lines 9-18), and the San Francisco Bay area, which are all places served by petitioners' rail lines. The incorrect and misleading statement of the Cities was apparently inserted in an effort to avoid any attempt to draw a parallel between this case and the *Walters (Nashville) case*, supra. Further, the Cities fail to mention "backlash" effect on traffic at the intersection of Los Felix and San Fernando Road. This latter road, a major state highway, carries an enormous amount of truck traffic (Cities' Brief, p. 49) competitive with the railroad; and the "backlash" directly affects and impedes that traffic. (P.U.C. Answer, p. 5). The proposed grade separation will relieve the backlash and congestion on San Fernando Road (P.U.C. Answer, p. 5).

(2) Another incorrect statement is:

"The number of train movements has materially increased in the last fifteen years." (Cities' Brief, p. 6)

The transcript reference was given as page 71. At that passage the Planning Commissioner of Glendale testified that at *Goodwin Avenue*, the next crossing, there were in 1936 24 train movements per day, as compared with 69 or



70 train movements per day at *Los Feliz* in 1951. There was no evidence of the number of movements per day in 1951 at Goodwin Avenue, or the number of movements at *Los Feliz* in 1938. On cross-examination the witness admitted the Goodwin Avenue crossing was not comparable with *Los Feliz*; and said:

"Q. Where is Goodwin Avenue in relation to *Los Feliz*?

[fol. 313] A. Northwesterly.

Q. How far?

A. I would not know the exact distance. I would say it is over a half mile.

Q. You have made no check to compare switching movements on Goodwin Avenue and switching movements on *Los Feliz*, did you?

A. No. I think it is obvious that the amount of switching movement at *Los Feliz* is not the same as Goodwin Avenue.

Q. You do not know?

A. I definitely know.

Q. What is the difference?

A. The difference is practically no switching movement at Goodwin Avenue as compared on *Los Feliz*.

Q. In other words, there are a lot of switching movements at *Los Feliz*?

A. Yes.

Q. So, there would be more train movement at *Los Feliz* than at Goodwin at any particular year?

A. I would assume so.

Q. So, using the Goodwin Crossing report is not comparable with *Los Feliz*; is that right?

A. I think if you want through trains for through trains, that statement in the report will give us something on which we can base what the through train movement is today, and I think anybody will admit that with a doubling of the population of the metropolitan area, the Southern Pacific's business of through trains has increased a little.

Q. You do not know?

A. I do not know until I have checked the record, but I am putting it in the record for that purpose."

(Rep. Tr., pp. 107-108)

[fol. 314] Further, the switching movements at Los Felix have been static for many years (Rep. Tr., pp. 245-246, 262).

- (3) The following statement is likewise misleading:  
 "and the length of freight trains has been drastically increased during the lives of some of the Railroad's personnel." (Cities' Brief, p. 7)

The transcript reference was given at page 256. The Superintendent of the Petitioner was testifying, a man of some 49 years railroad experience (Rep. Tr., p. 241. He said:

"Q. 25 years ago did you run 90-car trains and 100-car trains as a regular rule, or wasn't it nearer 60?

A. Going back 25 years ago, I would say 75, 80 cars to a train was a pretty good sized train.

Q. That was a long train at that time?

A. Yes. When I was a brakeman, a 35-car train was a big train. That takes you back a long ways.

Q. The length of trains, then, have been gradually increasing over the years?

A. Oh, absolutely; sure, certainly. As I said before, and I want to repeat, that 100 cars is the maximum number of cars that we operate in any one freight train." (Rep. Tr., pp. 256-257)

It is to be noted that these references are to maximum train lengths ("good-sized," or "big" trains), not to averages (Rep. Tr., pp. 253-254 and 256). Further, at Los Felix most of the "trains" are actually switching movements with relatively few cars (Rep. Tr., pp. 107-108, and 408 and following).

- (4) Another statement which gives a false impression is:  
 "The backlash occurs \* \* \* upon the railroad tracks \* \* \*." (Cities' Brief, p. 7)

[fol. 315] The transcript reference was given as page 197. On this topic of "backlash" on the tracks, the testimony shows:

"Q. With this increasing volume of traffic, isn't it more likely or very likely that there will be increasing occasions when backlash will also affect the railroad crossing?

A. No. I do not think so, because we hold our trains back there. They are coming in slow, anyway, and it is possible to hold them back so that they do not reach the crossing.

Q. If the backlash should occur more frequently in the future, isn't it very likely that on the occasion of one of those backlashes that there will be an accident, which would make the \$475 per year claims—

A. No, I do not.

Q. —very small?

A. Pardon me. I do not, for the reason that the gates in the future would perform the same use as they do now, and that is to cut the vehicles off. That tower man can see what the condition is up towards San Fernando Road, and also looking toward Riverside Drive. He can use his judgment in getting that gate down there, if he has an approaching train, to avoid that very thing of an accumulation of traffic on the crossing. So, I do not think that that condition would be changed at all as long as the gates are in there." (Rep. Tr., pp. 315-317)

and

"Q. In your estimate, did you include any sum representing possible or probable increase in damage claims during future years if the underpass is not constructed?

A. We did not, because we had so very few records in there that the past experience was considered to be [fol. 316] comparable with the future because of the very limited number of accidents. The principal trouble we have had in there is the breaking of the gates." (Rep. Tr., p. 314)



B. Point I of the Cities' answer and brief (pp. 8-10), relating to the Commission's power and duty to apportion costs, adds nothing to the discussion of the problem in question other than cite the Constitution of California, a code section, and a decision of the Commission in another matter.

C. Point II of the Cities' answer and brief (pp. 11-21) asserts in substance that the Commission can require a railroad to pay the entire cost of a grade separation. There are cited and discussed six decisions of the Supreme Court of the United States dealing with grade separations and particularly with cost allocations. All the cases thus cited were decided prior to the *Walters (Nashville)* case (*Nashville, C. & St. L. R. Co. v. Walters*, 204 U. S. 405). Four of the six cases cited, *Chi., Mil. & St. P. Ry. v. Minneapolis* (1914), 232 U. S. 430, 58 L. Ed. 571; *Mo. Pac. Ry. v. Omaha* (1914), 235 U. S. 121, 59 L. Ed. 157; *Erie Railroad Co. v. Board of Public Utility Comrs.* (1920), 254 U. S. 354, 65 L. Ed. 322; and *Lehigh Valley R. R. v. Commissioners* (1928), 278 U. S. 24, 73 L. Ed. 161, were analyzed in the petition (pp. 33-43), and are there shown to be inapplicable to the essential issues in the present case. The other two (*Cincinnati, I. & W. Ry. v. Connersville* (1910), 218 U. S. 335; and *Northern Pacific Railway v. Duluth* (1903), 206 U. S. 583) are even earlier than the four which we have analyzed, and thus even less relevant to the issues presented here.

The *Nashville* case, or, as referred to by petitioner, the *Walters* case is discussed by the Cities at p. 28 and following of their answer and brief. The Commission also discusses [fol. 317] this case at length in its answer (at pp. 19-25). In the preceding subdivision hereof in which we reply to the Commission's answer, we have reviewed the *Nashville* case again (note, pp. 23-30), in the light of the Commission's comments, and that discussion will also serve as our reply to the Cities' argument.

Obviously no weight can be given to the older cases, decided before the *Walters* case, for that decision, as we have shown, marked a recognition of the changed circumstances in this particular field, and gave impetus and express approval to the principle of apportionment on the basis of benefits, as opposed to mere arbitrary action such as ex-

supported by the decision here under challenge. The salutary result of the Supreme Court's new approach is shown by the decision in the *Village of Spencer* case, *supra* (5 N.Y.S. 2d 944, 249 N.Y. App. Div. 418), wherein the Court stated:

"Furthermore, the imposition of such financial burden upon the railroad must bear some reasonable relation to the evils to be eradicated or the advantages to be secured; it is not sufficient to justify the imposition of such financial burden upon the railroad to show that public convenience will be promoted, but there must be some reasonable relation between the improvement and the promotion of public safety. *Nashville, C. & St. L. Ry. v. Walters, supra.*"

B. Point III of the Cities' answer and brief (pp. 22-40) contains the phraseology similar to that employed by the Commission that there is no "logical or legal basis" for the "benefit principle." Two groups of cases are cited. The first group again includes only cases decided before the *Walters* case. These cases are:

*State v. Public Service Commission of Missouri* (Mo., 1904), 72 S. W. (2d) 101 (p. 24);

(*Vol. 318*)  *Erie Railroad Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394, 413, 65 L. Ed. 322, 335 (pp. 27-28 and 38);

*Application of the City of Los Angeles* (1932), 57 C.R.C. 784, 787 (p. 36).

To the above should be added *In Re New York O. & W. Ry. Co.* (1933), 280 N.Y.S. 174 (cited at p. 37), which, although decided shortly after the *Walters* case, obviously was decided without reference to, or knowledge of, the doctrine of the *Walters* decision, since the latter is not cited in the opinion.

It is particularly interesting to note that the Cities refer (p. 36) to the decision in *Application of the City of Los Angeles* (1932), 57 C.R.C. 784, 787. As already stated (*ante*, p. 56) that decision involved a proposal to widen underpasses. The proposal was approved, but the order

was never carried out. However, as we have emphasized in Part I hereof (at p. 36) in that opinion the Commission said:

"There can be no question that the vehicular public will receive the greatest benefit from the widening of these separations, so it logically follows that this class of the public should bear the greater portion of the cost."

In spite of this clear recognition of the benefit principle, the decision is cited nevertheless as authority for the Cities' contention that there is no logical or legal basis for the apportionment of the costs of the proposed separation to the parties respectively in accordance with the benefits to be received by them. Apparently the Cities' representatives have not recently reviewed the litigation in which they or their predecessors took part some twenty years ago. [fol. 319] The second group of cases cited by the Cities includes a number of cases decided since 1935, when the *Walters* decision was rendered. The first of these is *State v. Public Service Commission of Missouri* (Mo., 1936), 340 Mo. 225, 100 S. W. 2d 522, 109 A.L.R. 754 (p. 22). We have already pointed out (ante, p. 35) that in that case the Court said (100 S. W. 2d at p. 530):

"The City devoted a great portion of its brief to urging that the so called 'user basis' theory, or the theory of 'comparative use,' or of 'relative benefits' either to the railroads or the public, were not proper methods in arriving at a proper allocation of the cost. It insists that the extent to which the presence of the railroad at the point of crossing creates the danger and enhances the cost of elimination of the crossing is the proper basis upon which to apportion the cost. That theory may be proper in certain cases, where the only purpose of building a structure is a separation for the purpose of eliminating a dangerous crossing. The case under consideration, however, is peculiar in itself. Of all the cases cited in the briefs and in none that have come to our attention was there a situation, as we have here, presented to a commission or a court. . . ."



"Benefits which the various parties derived as the result of the project were of special importance in this case."

Thus the decision, far from rejecting or denouncing the benefit principle, appears to have accorded substantial weight to the benefits accruing to the parties.

In *Lehigh and New England R. Co. v. Public Service Com's* (1927), 125 Pa. Super. 565, 191 A. 380, 383 (p. 25), [fol. 320] the Court was careful to state in a case involving the reconstruction of a crossing:

"These provisions of the Public Service Company Law which are applicable were enacted by virtue of the police power of the state; and, as we said in *Wilkes-Barre Railway Corporation v. Public Service Comm. et al.*, 125 Pa. Super. 362, at page 368, 188 A. 546, at page 548, 'the lawful exercise of the police power might take place any time and the parties concerned be required to pay their proper share.' This, however, is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. *Nashville, Chattanooga & St. Louis Railway v. Walters et al.*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949."

In *Lyford v. State of New York* (1944), 140 F. 2d 840 (p. 35), the Court simply relied upon *Eric Railroad Co. v. Board of Public Utility Comrs.*, *supra*, and a New York constitutional provision. The *Walters* case was not discussed or even mentioned. In view of this omission, it is difficult to believe that the case can be regarded as authoritative. The companion case of *State of New York v. Gebhardt* (1945), 151 F. 2d 802 (p. 37), is of no assistance, since the Court did not discuss either the benefit principle, nor the apportionment of costs on any other basis.

The other case cited by the Cities is *In re Elimination of Highway-Railroad Crossings* (1937), 299 N.Y.S. 693 (p. 37). The opinion therein states (pp. 701-2):

"The order of the commission, however, must be reasonable, when viewed in the light of the surrounding circumstances, or it will be considered arbitrary and

oppressive, and will not be permitted to stand. The police power of the State is subject to the constitutional [fol. 321] limitation that it may not be exercised capriciously or unreasonably. *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 234 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949."

The New York decisions should be read in the light of the *Village of Spencer case, supra*, in which, as already noted, the railroad is shown as having contended (5 N.Y.S., p. 949):

"The argument of the appellant is that the promotion of safety is no longer the main purpose of grade crossings elimination, but that the emphasis has changed so that the main purpose now is the furtherance of an uninterrupted rapid movement by motor vehicles irrespective of the question whether public safety requires such improvement."

and the Court responded (p. 950):

"Furthermore, the imposition of such financial burden upon the railroad must bear some reasonable relation to the evils to be eradicated or the advantages to be secured; it is not sufficient to justify the imposition of such financial burden upon the railroad to show that public convenience will be promoted, but there must be some reasonable relation between the improvement and the promotion of public safety. *Nashville, C. & St. L. Ry. v. Walters, supra*."

E. In Point IV, at page 41 of the Cities' answer and brief, there appears Subdivision A captioned "General Principle to Be Used in Determining Benefits Received by Railroad." The subject matter constitutes a presentation of the Cities' so-called "barrier theory": i.e., that the railroad obstructs the roadway, and therefore should pay all the costs of the grade separation required to remove the barrier [fol. 322] created by the presence of the railroad tracks. This theory is unrealistic, unreasonable, and legally indefensible.

(1) The Cities argue that the railroads seem to have been given some special consideration at crossings, and that

"if the railroad would operate in the same manner as other traffic and comply with the laws of the road applicable to other traffic, this special burden would of course not be assessed against the railroads." (Cities' Brief, p. 48)

The Cities' argument takes no account of actualities. Traffic is what? Does it consist of automobiles only? Of course not. Even a brief examination of the Vehicle Code and municipal ordinances discloses there are many separate and unlike groups. There are pedestrians, horses and livestock, automobiles, trucks, busses, farm equipment, house-movers, street cars, railroad cars and trains, etc. The "laws of the road" are not uniform in application to each group. Affecting railroads, there are municipal ordinances, the Public Utilities Act, the orders of the Public Utilities Commission, etc. Railroads, like everyone else, certainly obey the "laws of the road."

(2) It is to be remembered that the railroad was first in the area, in point of time (Rep. Tr., pp. 225-226, 238); that Los Feliz was opened across the railroad at a later date. The formal highway easements granted to the City of Glendale provided:

"This grant (to the City by the Railroad) is subject and subordinate to the prior and continuing right and obligation of the first party (the railroad) to use and maintain its entire railroad right of way and property in performance of its public duty as a common carrier." (Exa. 13, 14 and 15)

[fol. 323] The railroad's titles to its land are property rights, which the petitioner is entitled to have protected under the state and federal constitutions. In fact, the Courts have always recognized that the railroads are part of the great highways of the country. It must be remembered the Cities' right to open a street across a railroad, under the police power, is not the same thing as the power of the public to require *by subsequent proceedings*, that the highway be made *safe*.



The leading case that draws this distinction is *City of Oakland v. Schenck* (1925), 197 Cal. 456, 241 Pac. 545, where the railroad appealed from a judgment granting the nominal sum of \$1.00 for railroad lands condemned by the City of Oakland. This case has already been discussed briefly at pp. 46-47 of this reply, in connection with its citation by the Commission at page 50 of its answer. Concerning the railroad's property rights, this Court said:

"It may not be questioned that a railroad's right of way is so far private property as to be entitled to protection of the constitution, so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of that power is that the statute conferring it make provision for reasonably compensating the owner. (*Western Union Tel. Co. v. Pennsylvania R. R. Co.*, 195 U. S. 540, 570 [1 Ann. Cas. 517, 49 L. Ed. 312, 25 Sup. Ct. Rep. 133, see also *Rose's U. S. Notes*].) The interest appropriated by the party condemning may be small, and the amount of compensation difficult of proper measurement, but some award should be made, however small the amount may be. \* \* \* *If the opening of the street across the railroad tracks in this case does not unduly interfere with the companies' use for legitimate railroad purposes, then their compensation should be nominal. (P. 460.) If, prior to [fol. 324] the institution of the condemnation proceedings, the railroad companies had constructed upon the land embraced within the crossing buildings to be used in their business, it would have been necessary, in ascertaining the just compensation to be awarded, to take into consideration the value of such improvements. (P. 461.)* Appellants cannot recover for such costs. The expenses that will be incurred by the railroad companies in making structural changes such as filling the portion of the tracks between the rails, and two feet outside, with planks, and other crossing changes, in order that the railroad may be safely operated, necessarily result from the maintenance of a public highway, under legislative sanction, and must be deemed to have been taken into account by the railroad companies when

they accepted the privileges and franchises granted by the state. *Such expenses must be regarded as incidental to the police power of the state.* (P. 462.) The acquisition by eminent domain of an easement for street purposes by a municipality is one thing. *The power of the public to require, by subsequent proceedings, that its highways be made safe is another.* \* \* \* The duty resting on the railroad companies to make the necessary changes and improvements does not arise because of the opening of the street, but because of the obligation imposed through the exercise by the city of the power to order the crossing improved whenever it becomes necessary for the protection of life and property." (P. 463.) (Emphasis added.)

Further defining the property rights held by a railroad in California, the Court stated:

"In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase, although it may obtain only an easement [fol. 325] for railroad purposes if it resort to proceedings in eminent domain." (P. 466.)

Even the fact that the railroad may, regardless of its property rights, acquire a franchise right to cross the street from the City in no way estops the railroad from claiming all of its constitutional rights incident to property ownership. (*City of San Diego v. Southern Cal. Tel. Co.* (1949), 92 Cal. App. 2d 793, 808, 208 P. 2d 27, and *Ocean Park etc. Corp. v. Santa Monica* (1940), 40 Cal. App. 2d 76, 104 P. 2d 668.)

We therefore come back to the incontrovertible proposition that, as the Cities say: "The instant case represents an exercise of the police power." The railroad is entitled to assert its rights incident to property ownership. The railroad may not be charged and its property may not be taken under the police power, or under the theory of *damnum absque injuria*, except upon reasonable application of the police power, taking into consideration such factors as which party introduced the danger; and any assessment of

costs upon the railroad must have a substantial relation to the purpose to be accomplished.

In other words, the fact that the City holds an easement for street purposes is something very different from the right to require the railroad to participate in the cost of the separation, which can be done only when public safety is actually and substantially involved.

It was further pointed out in *Black v. Southern Pacific* (1932), 124 Cal. App. 321, 331, 12 P. 2d 981, 985:

"But it is well settled that a railroad right of way is so far private property as to be entitled to the protection of the Constitution, and that it can only be taken without its consent under the power of eminent domain, [fol. 326] a condition precedent to such taking being that provision be made for reasonable compensation to the company."

Thus the conclusion to be reached is that where public safety is not involved, there is no duty on the railroad to expend any of its funds for any portion of the costs of grade separations. (Compare *Northwestern Pac. R. R. Co. v. Superior Court* (1949), 34 Cal. 2d 454, 211 P. 2d 571, holding that a municipality may not interfere with the railroad use of property owned by the railroad even though it pays adequate compensation in condemnation proceedings and then only subject to the orders of the Public Utilities Commission.)

(3) The railroad is, of course, a quasi-public corporation. Its lines are devoted to the public use and because of its status it is required to accept the regulation of public authority, but it is, nonetheless, a private owner of property. Petitioner's position in respect to the barrier theory advanced by the Cities is simply this, that besides having the usual rights of a private owner of property, its rail lines fulfill a public need the same as the streets. The railroads give a *quid pro quo* in service to the public at large, in return for their right, based on public need and practical necessity, to operate trains without normally stopping at traffic signals, and to cross streets, highways, and rivers, etc.



(4) It is also asserted in Point IV of the Cities' answer and brief (pp. 41-48) that the benefit principle as advocated by petitioner does not include the calculation of certain allegedly "obvious" benefits. The Commission has followed the lead of the Cities, and advanced the same contentions; [fol. 327] and therefore, for convenience, these contentions have been discussed in their entirety at pages 40 to 46 hereof, *ante*.

F. Point V of the Cities' answer and brief (pp. 49-52) asserts that the Orders of the Commission constitute a justified and reasonable exercise of the police power. These arguments apparently are set forth in the hope, that, somehow or another, this Court may be induced to believe that public *safety* is materially involved. The argument fails to discuss so-called public *convenience* (i.e., convenience of motor vehicle traffic) in its relation to the apportioning of costs. Much of this same argument is presented by the Commission, and for convenience these arguments have been discussed in one place, at pp. 34 to 37, *ante*.

G. In the answer and brief of the Cities (as well as in the Commission's answer) the attempt is made to justify the allocation of one-half of the costs of the separation to petitioner as a valid exercise of *police power*, and as *damnum absque injuria*. Since petitioner believes that the fundamental and primary question before the Court is whether or not the Commission's order is a constitutional exercise of the *police power* (*Nashville, etc. v. Walters, supra*) it is desirable again to review the basic characteristics of the police power, and the constitutional limitations thereon. We therefore set forth below the essential characteristics of the police power, as involved in this case:

1. Petitioner is a railroad corporation carrying on its business in California, and claims the protection of the Commerce clause (Art. I, Sect. 8, par. 3) of, and the due-process clause of the Fourteenth Amendment to the United States Constitution, and Article I, Sections 13 and 14, of [fol. 328] the California Constitution, against the application of state authority, delegated to the Public Utilities Commission, in the same way that an individual might claim that protection. A title to land in fee simple or an ease-

ment in land owned by the railroad is a property right protected by both Constitutions.

*Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, reversing 67 P. 2d 675, 8 Cal. 2d 624 (1937);

*Los Angeles Railway Corporation v. Railroad Commission of California*, 29 F. 2d 140, aff'd, 280 U. S. 145, 74 L. Ed. 234;

*Merced Dredging Co. v. Merced County*, 67 Fed. Supp. 598.

It has already been pointed out (*ante*, p. 70) that the railroad was the first in the area in point of time (Rep. Tr., pp. 225-226 and 238), and that Los Feliz road was opened across the railroad at a later date.

2. The due process clause of the Fourteenth Amendment requires that State action shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

*Merced Dredging Co. v. Merced County*, *supra*, p. 606.

3. The police power of the State may not be invoked to satisfy a mere public wish or desire, or demands founded upon aesthetic or sentimental considerations, but only to protect essential public interests.

*Merced Dredging Co. v. Merced County*, *supra*, p. 607.

[fol. 329] 4. The police power may be invoked in derogation of property rights only when founded upon valid and substantial considerations relative to the health, the morals, or the safety of the public. In *Hart v. City of Beverly Hills* (1938), 11 Cal. 2d 343, 345, this Court stated:

"By judicial determination, evidenced by many legal precedents, the principle of law is thoroughly established, that the constitutional rights of the individual to acquire and to possess property includes the right to dispose of it . . . excepting only in that regard, that the exercise of the police power may be invoked in

derogation thereof when it is founded upon valid and substantial considerations relative to the health, the morals, the safety or the 'general welfare' of the public."

At page 346 this Court said:

"Covering a period of decades, the exercise of the police power was limited to conditions wherein either the health, the morals, or the safety of the general public was seriously and unquestionably involved. As long as any or either of such requirements were or was respectively maintained, personal liberties were not seriously endangered,—but not so, necessarily, upon the advent of the addition of the element of 'general welfare' to those constituents which theretofore solely had constituted a justifiable excuse of warranty for the destruction of natural rights. It is obvious that in its liberal and untrammelled construction, 'general welfare' has an infinite range,—nearly, if not as completely beyond the contemplation of the human mind as is the universe itself. \* \* \*

"Thus, if the meaning of the words 'general welfare' be accorded their utmost significance, the original 'due process' protector of human rights may be so endangered by the attacks made thereon by the 'police power' destroyer that considering present legislative tendencies, within the lives of those now in being, if utter annihilation of the substance of constitutional guaranties do not ensue, no more than a shadow ultimately may remain. \* \* \* But such results may ensue only in the absence of conservative and conscientious judicial construction and interpretation of legislative acts. As hereinbefore has been indicated, it should be noted that the words 'general welfare' have been grafted upon the original stock of 'health, morals and safety,' with the resulting incident that they must be interpreted in accord with the rule that requires that when words of a general character follow those of special meaning the former must be governed in their significance by that which inheres in the latter. Otherwise stated, in the construction of a statute, special words



employed wherein are the guiding, if not the controlling force as regards general and succeeding words (citing authorities). With such reversion to legal principles of statutory construction, their application to the instant situation must result in the conclusion that the inclusion of the words 'general welfare' as an element either essential, or which may be relied upon as affording a justification for that which otherwise properly might be termed a violation of the personal rights of the individual, has the effect only of enlarging or expanding the significance that formerly was deemed properly attachable to the grounds originally deemed necessary to the expedient exercise of the police power of the State."

The ruling of this Court in the cited opinion requires, therefore, that any legislative act in this state in order to be valid, in the face of a challenge on constitutional grounds, must bear a reasonable relation to *public health, safety or morals*.

[fol. 331] 5. In *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, supra, the Court held that direct interference with and regulation of a subject matter committed by the Constitution to the exclusive control of Congress could not be avoided by the State,

"by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.' (Citing cases) \* \* \* Furthermore in the present case it is not pretended that local welfare needs the removal of the defendants' bridges at the expense of the dominant requirements of commerce with other states, but merely that it would be helped by raising them. The fact that the court cannot order them to be raised does not justify a judgment that they be destroyed even in the avowed expectation that what it wants but cannot command is all that will come to pass." (Emphasis added).

As expressed by the Court in the *Nashville* case (294 U. S., at p. 415):

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be executed arbitrarily or unreasonably."

At pages 428-49 the Court further stated (in language already referred to):

"The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, unless it can be shown that a duty to provide the particular convenience rests upon it. *Missouri Pacific Ry. v. Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. v. Nebraska*, 217 U. S. 196; *Great Northern Ry. v. Minnesota*, 238 U. S. 340; *Great Northern Ry. v. Cahill*, 253 U. S. 71. These were the authorities relied upon by this Court in *Chicago, St. P., M. & O. Ry. v. Holmberg*, 282 U. S. 162, 167, where it held that to require a railroad to provide, at its own expense, an underpass, not primarily as a safety measure but for private convenience, was a denial of due process.

"It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals. *Chicago, B. & Q. R. Co. v. Illinois ex rel. Drainage Commissioners*, 200 U. S. 561, 592. And it was stipulated that 'in the light of modern motor vehicular traffic anything which slows up that traffic is an inconvenience. In other words, eliminating a grade crossing, as in the case at bar, facilitates the speed of motor vehicular traffic, in accordance with public demands.' But when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured. Compare *Hadacheck v. Los An-*

cases, 239 U. S. 394; *Miller v. Schoene*, 276 U. S. 272. While moneys raised by general taxation may constitutionally be applied to purposes from which the individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southeastern Ry. v. Nottin*, 277 U. S. 157, 159; *Memphis & Charleston Ry. v. Pace*, 282 U. S. 241, 246; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them." (Emphasis added).

[fol. 333] 6. In *House v. L. A. County Flood Control Dist.* (1944), 25 Cal. 2d 384, 163 P. 2d 930, plaintiff set forth that defendant had removed safe and secure protection adjacent to her land and substituted therefor an unsafe bank resulting in the inundation of her property. Reversing the judgment of dismissal after the lower court sustained a demurrer to the complaint, this Court had the following to say regarding police power (at p. 388):

"Accepting the premise of argument of the parties here that a levee improvement made in the channel of a stream for the general welfare is referable to the police power, the propriety of its exercise must still be considered under the distinct circumstances presented. While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation."

This Court then quoted from *Archer v. City of Los Angeles* (1941), 19 Cal. 2d 19, 119 P. 2d 1 as follows (p. 388):

"The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety or morals. (Citing authorities.) In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner. \* \* \*"



and continued (p. 388):

"Thus there is recognized the incontestable proposition that the exercise of the police power, though an [fol. 334] essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property." (Emphasis added.)

Justice Carter's observations in his dissent in *Archer v. City of Los Angeles*, 19 Cal. 2d 19, 29, although involving the flooding of privately owned lands by the Los Angeles Flood Control District, are just as pertinent here:

"The true basis of liability in cases of this character is found in the constitutional provision prohibiting the taking or damaging of property for a public use without the payment of just compensation. (California Constitution, art. I, sec. 14.) The liability exists independent of negligence on the part of the public agency." (P. 35.)

"Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare. If the degree of public necessity be the test then the constitutional guarantee of just compensation for property taken for a public use is completely and forever shroated. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damages for a public improvement. Who may say that property for [fol. 335] schools, highways, streets, etc., is not absolutely necessary for the proper functioning of the gov-

ernment? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated. Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation could be recovered. Although it is difficult to charter the dividing line between the exercise of the two powers, it may be justifiably said that police power operates in the field of regulation, except possibly in some cases of public emergency such as a fire where buildings may be destroyed, rather than in the taking or damaging of property for some public improvement. A man may be prevented under the police power from so using or maintaining his property that it is detrimental to the public health, safety, morals or general welfare. Regulations may be invoked to prohibit such use and maintenance. But where neither his property nor its use or maintenance by him has any relation to the public good sought to be accomplished or evil to be remedied, other than that the public desires to use his property, he should be compensated for the taking or damaging of it if the constitutional guarantee still exists." (Pp. 54, 55.)

"I cannot refrain from adverting to the recent but growing tendency of some courts and judges toward the destruction of constitutional guarantees by the process of specious interpretation. It may be that such constitutional guarantees are obnoxious to the social or economic philosophy of the judge or judges deciding the particular cause; but I submit that it is for [fol. 336] the people and not the courts to bring about changes in our Constitution. To invoke the police power as a justification for the taking or damaging of private property for public use in violation of section 14 of article I of the Constitution of California is nothing less than amending the Constitution by judicial edict or nullification by sanction of law." (P. 59.)

The *Archer* case was followed in the holding of this Court in *Ross v. State of California*, 19 Cal. 2d 713, 105 P. 2d 302. There plaintiff sued to recover compensation for damages caused through loss of its means of ingress and egress by the construction of a subway or underpass in the center of the street. Defendant contended that the damage, if any, occurred as a result of the exercise of the police power and was therefore *damnum obsequit injuria*. In response to defendant's contention, the Court said:

"This contention is wholly without merit as there is no basis for the application of the police power doctrine to the factual situation in this case.

"Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiff's property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.

"While it is true that the seeming absolute protection against the taking or damaging of private property for public use provided for in section 14 of article [fol. 337] I of our Constitution may be qualified by the police power in the area in which such power operates, it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our Constitution against the taking or damaging of private property for a public use without compensation. (*Gray v. Reclamation Dist. No. 1500*, 174 Cal. 622 (163 Pac. 1024); *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 260 U. S. 393 (43 S.Ct. 158, 67 L. Ed. 322).)"



7. No exercise of the police power is constitutional unless it meets the test of *reasonableness*.

"The power to regulate the use of property or the conduct of a business is, of course, not arbitrary. The restriction must bear a reasonable relation to some legitimate purpose within the purview of the police power."

*Ex parte Hadacheck* (1913), 165 Cal. 416, 421, 132 Pac. 584; affirmed (1915) 239 U. S. 394, and cited with approval in the *Walters case* (294 U. S., at p. 429).

On reasonableness as a test, the text writers all agree, e.g., 16 C.J.S., pp. 562-563:

"The police power is subject to the limitation that its exercise must be reasonable and for the public good, \* \* \* the test of the validity of an exercise of the police power is whether it is reasonable."

At 16 C.J.S. 1159 there is stated generally as a section heading:

"The guarantee of due process does not prevent the exercise of the police power, provided such exercise is [fol. 338] reasonable and the means selected have a real substantial relation to the object sought to be attained."

Under this heading, just quoted, the text at 16 C.J.S. 1160-1163 states:

"Hence, while the guaranty does not interfere with the proper exercise of the police power, and does not prohibit governmental regulation for the public welfare, it of necessity giving way to reasonable police regulations protecting life and property, the due process clause does condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process, which demands that it be for a public purpose, that it be not unreasonable, arbitrary, or capricious, which demands only that the law shall not be unreasonable, arbitrary, or capri-

cious, or that the law shall not be unduly oppressive, and that the means selected shall have a real substantial relation to the object sought to be attained."

8. Most important of all, the reasonableness of any application of the police power is to be tested in the light of contemporaneous conditions. In *Wholesale Tobacco Dealers Bu. v. National Candy & T. Co.* (1938), 11 Cal, 2d 634, 644, 82 P. 2d 3, the Court says:

"The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. *The proper application of the power cannot be measured by past precedents—the test [fol. 339] is, of course, present day conditions.* These principles have frequently been enunciated by this court and by the Supreme Court of the United States." (Emphasis supplied)

The bases for petitioner's charge that the Commission's order is unconstitutional are restated for clarification. Petitioner's property is summarily taken without compensation in the form of benefits received by the proposed construction. Additionally, a substantial financial burden is imposed upon petitioner as an essential instrumentality of interstate commerce, which burden is wholly disproportionate to the slight and dubious safety advantages (if any) resulting therefrom. The substantial subject matter within the province of the police power—public health, morals, safety and welfare—has no substantial relation to the "object sought to be attained" which in this proceeding is primarily, indeed almost entirely, the expediting of vehicular traffic. The challenged imposition does not bear a reasonable relation to "the evils to be eradicated or the advantages to be secured." The correct test of whether or not the police power has been properly exercised is not and

never has been the degree of public necessity, much less mere convenience. No emergency exists to justify the taking of property without compensation or in lieu thereof benefits that accrue to petitioner. Finally, the Commission's purported exercise of the police power is in fact a reversion and retrogression to conditions existing long ago, is based upon outmoded precedents, ignores present day conditions, and is therefore unreasonable.

[fol. 340]

### III

Petitioner Is Entitled to Have This Court Exercise Its Independent Judgment Upon the Law and Facts in This Case.

In this proceeding petitioner, from the outset, has maintained and continues to maintain, as the principal basis for its challenge of the order here under attack, that said order violates rights guaranteed to petitioner under the Constitution of the United States: specifically, the Commerce Clause (Article I, Sec. 8, Par. 3), and the due-process clause of the Fourteenth Amendment. (See pp. 6 and 7, of the petition and pp. 86-88, and 94, of the supporting memorandum of points and authorities.) In view of the constitutional issues thus presented, petitioner has therefore asserted that in determining the merits of this case this Court may and should exercise its independent judgment upon the law and the facts (petition, pp. 6, 7); and has relied upon Section 1760 of the Public Utilities Code and, among others, the following decisions: *Bluefield Water Works Co. v. Public Service Commission* (1922), 262 U. S. 679; *Ohio Valley Water Co. v. Ben Avon Borough* (1920), 253 U. S. 287; *Nashville, C. & St. L. R. Co. v. Walters, supra*; and *Southern California Edison Co. v. Railroad Commission* (1936), 6 Cal. 2d 737, 59 Pac. (2) 808.

Notwithstanding the apparently clear statement and exposition of petitioner's position, the Commission, in its answer (at p. 57) advances the following argument:

"Surely no public utility has a right to relitigate in the courts, on the grounds that constitutional rights are involved, factual questions such as herein determined by the Public Utilities Commission";



[fol. 341] and again (at p. 28) directs its argument to petitioner's asserted contention for a "trial *de novo*."

It is almost superfluous to say that petitioner has not contended, and does not contend, that this case should be "relitigated," i.e., retried anew in this Court. It would seem that a mere casual reading of the petition and supporting brief would have disclosed sufficiently that petitioner was seeking nothing more than an independent determination by this Court *upon the record made before the Commission*, as contemplated by the express language of Section 1760 (when read in connection with Section 1757 of the Public Utilities Code), and the decisions of this Court applying those statutory provisions. Compare the prayer of the petition (p. 9), in which petitioner asks (1) that this Court require *the Commission to certify to the Court its complete record* in the proceedings before it, and (2) that the Court then review *the record of said proceedings*, and *thereupon* render its decision; and see also the citation (p. 56 of the petition) of Section 1760, and the controlling decision of this Court in the *Edison Case*, *supra* (6 Cal. 2d, 737). If further clarification of petitioner's position be needed, we need only add that we rely upon the principles stated in the following quotation from California Jurisprudence (2 Cal. Jur. 2d 373):

"With respect to constitutional facts, for instance, the courts may consider the evidence presented in a proceeding in order to determine whether an administrative decision or order violates any right of a party under the state or federal constitution, even where the proceedings are before an agency enjoying special constitutional status whose determinations are otherwise subject only to a limited review. The rule that the ad-[fol. 342] ministrative determination of facts bearing on constitutional rights of a litigant, even though supported by evidence, is not conclusive on the court, and that the court will exercise its own independent judgment on the evidence, is typically applied where rates found by an administrative authority to be reasonable are attacked as confiscatory and the court makes its own determination as to the value of the property involved."

Considered by itself, the Commission's apparent failure to read and understand petitioner's position with respect to the scope of this Court's review would be of little consequence. However, this initial misconception has been employed by the Commission as the starting point for a series of arguments which, when taken together, amount to a broad contention that in this case (or presumably any other of like character) this Court has no power or duty to inquire into the facts, other than as found by the Commission, or to review the underlying evidence, or otherwise to take any steps whatever in order to determine whether the Commission has correctly found the facts, or has, on the other hand, sought to support erroneous conclusions through the medium of "insubstantial findings of fact screening reality" (*Milkwagon Drivers' Union v. Meadowmoor Dairies*, 312 U. S. 287, 293).

Thus, as already noted, the Commission argues (Answer, p. 41) that its "decision carries a strong presumption of validity," and "has the same force and effect as a statute enacted by the legislature"; (p. 43) that "this Court may not substitute its judgment for that of the" Commission; (p. 45) that the Commission's "authority over Public Utilities" is "plenary and exclusive," and that the Legislature [fol. 343] "may confer upon the Commission powers that the Legislature itself could not exercise"; (p. 47) that "the constitutionality of a statute" (and hence presumably of this order) "will only be passed upon where absolutely necessary"; and (pp. 28-30), that since the United States Supreme Court has (assertedly) repudiated the rule of independent court review in Commission proceedings where constitutional issues are raised, this Court should no longer observe or be guided by Section 1760 of the Public Utilities Code.

The simple and conclusive answer to the Commission's entire argument is that Section 1760 is still the law of this state; and in this respect the statute-law has not been changed since the predecessor statute was enacted in 1933. Moreover, and notwithstanding the decision of the United States Supreme Court rendered May 31, 1951, in *Alabama Public Service Commission v. Southern R. R. Co.*, 341 U. S. 341 (upon which the Commission principally relies, pp.

27-28, to support its argument), the legislature of this state re-enacted this particular provision of former Section 67 of the Public Utilities Act as present Section 1760 of the Public Utilities Code, by statute approved May 31, 1951, effective September 22, 1951.

The history of the original enactment of the amendment of Section 67 of the Public Utilities Act, now Section 1760, is set forth in some detail in this Court's opinion in the *Edison Case, supra* (6 Cal. 2d, at pp. 744-746). This Court remarked, in the course of that discussion, that the amendment of Section 67 had not accomplished any actual change in the prevailing rule in this state, in respect to the power of this Court to review quasi-legislative orders of the Commission. The Court said that even prior to the amendment [fol. 344] it was the Court's function to dispose of cases coming before it from the Commission for review, in which federal constitutional questions were appropriately raised; that in disposing of them the Court acted judicially, and its determination was "on the merits"; and that even though Section 67 had previously assumed to make final the Commission's findings and conclusions on questions of fact, the Court had excluded the apparent finality of that provision from operation, when federal constitutional objections were available to the complaining party (6 Cal. 2d, at p. 647).

Nevertheless, and regardless of the fact that Section 1760 has been so recently re-enacted, the Commission's position appears to be that the *Alabama decision* has effectively overruled and (to use the Commission's own terminology) "repudiated" the principle set forth in that section (Answer, p. 28). Analysis of the decision and consideration of its results will demonstrate that in fact nothing of the sort took place; in this respect, as in other passages in its reply, the Commission has apparently failed to understand the true import of the decision. Far from overruling or even departing from the principle of the *Ben Avon* decision, the Court in the *Alabama case* pointed out, in some detail, that the State of Alabama had provided for a full and independent review of orders of its Public Service Commission, by establishing a right of appeal to a court of first instance (the circuit court of a county), with an additional right of appeal from that court to the State Supreme Court. In both



courts, the consideration provided for was upon the record certified by the Commission, without the taking of additional evidence. The Court further noted that the highest court of the state had also held that when a denial of due-[fol. 345] process was claimed to be the effect of the challenged order of the state commission, the judicial review in the state courts contemplated the exercise by the court of independent judgment as to both law and facts (see 341 U.S., at p. 349). In this situation, the United States Supreme Court concluded that there was available, to the complaining party, an adequate state-court procedure for review of commission orders, sufficient to preserve federal questions arising out of such orders for ultimate review in the Supreme Court; so that resort to the United States District Court in a separate proceeding for injunctive relief was not necessary. The latter, and no more, was the question actually presented and decided.

The *Alabama decision* is pertinent here as approving in principle (and in no sense "repudiating") the scope of the review provided for in Section 1760; for in Alabama, as in this state, the review is on the record made before the Commission; the principal difference between the Alabama and the California procedures being that in Alabama there are appeals as of right, first to the Circuit Court and thence to the State Supreme Court, whereas in this state the only "appeal" is by petition for review to this Court.

Other recent decisions of the United States Supreme Court also clearly indicate that the rule of the *Ben Avon case*, and thus of Section 1760, is well recognized. *Oyama v. California* (1948, 332 U. S. 633 (636)); *Niemolko v. Maryland* (1951), 340 U. S. 268 (271); compare also this Court's recent decision in *Laisne v. State Board* (1942), 19 C. 2d 831, (845), 123 P. 2d 457.

The Commission's clear failure to analyze correctly the nature and result of the *Alabama decision* leaves its argument [fol. 346] on the points here discussed without any substantial authoritative support. The correct conclusion, based upon the statute and the controlling decisions, is that this Court not only may but must exercise its independent judgment on the law and the facts, and that such review is not foreclosed by any presumptions of validity or correct-

ness. The order here challenged being, as the Commission repeatedly asserts (answer, pp. 41-42, 47), "statutory" (i.e., legislative) in nature, this Court must necessarily pass upon the merits of the questions presented (*Edison Case*, *supra*, 6 C. 2d at p. 747).

The fact is that, in cases where constitutional issues have been presented, this Court, irrespective of asserted presumptions or other language relative to the weight to be given to determinations made by the Commission, has regularly and uniformly undertaken its own independent review of the record, and has never considered that the Commission's conclusions were controlling, or binding, or even presumptively correct, unless duly supported by adequate, competent, credible evidence; because obviously to have done so would have been to deprive the moving party of its right to an independent judicial determination. Compare, among other recent cases: *Southern Pacific v. Railroad Commission*, 13 C. 2d 125 (130), 87 Pac. (2) 1052; *Pacific T. & T. Co. v. Public Utilities Commission*, 34 C. 2d 822, 215 Pac. (2) 441; *Southern California Freight Lines v. Public Utilities Commission*, 35 C. 2d 586, 220 Pac. (2) 393; and *Souza v. Public Utilities Commission*, 37 C. 2d 539, 233 Pac. (2) 537. The governing principle is clearly indicated by the decision of the United States Supreme Court in *N. C. & St. L. R. Co. v. Walters*, *supra* (294 U. S. 405, pp. 415-416):

[fol. 347] "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the state in imposing upon the Railway one-half of the cost of the underpass was arbitrary and unreasonable, the Supreme Court of Tennessee obviously erred in refusing to consider them."

and (p. 428):

"The Supreme Court of Tennessee erred in refusing to consider whether the facts relied upon by the Railway establish as arbitrary and unreasonable the imposition upon it of one-half the cost of the underpass."

The Commission also cites (ans., p. 46) *Pacific T. & T. Co. v. Eshleman* (1913), 166 Cal. 640, 655-6, 658-9, 689, 137 Pac.

1119, to support the contention that the Legislature *may* confer on the Commission any and all authority it possesses. The cited pages of the *Eshleman* case indicate that the Court was there referring to "the authority of the Legislature to confer" powers upon the Commission, as provided in Article XII, Section 22, of the California Constitution. Nothing in this case is authority that the Legislature conferred *all* of its powers on the Commission.

Another case cited by the Commission (ans., p. 46) is *Clemmons v. Railroad Commission* (1916), 173 Cal. 254 (258), 159 Pac. 713, where this Court had before it the specific question as to when the Commission's orders take effect. The Court said:

"The power of review which is given must be exercised within the limits and upon the conditions which the legislature has seen fit to fix."

[fol. 348] This language may be compared with Section 1760, and this Court's expressions in *Southern California Edison Co. v. Railroad Commission*, *supra* (6 C.(2d), at pp. 744-746), where, as previously shown, the powers of this Court in review proceedings are discussed at length.

The decision in *City of San Jose v. Railroad Commission* (1917), 175 Cal. 284, 289, 290, 165 Pac. 967, appears to have been cited by the Commission (ans. p. 46) through error or misunderstanding. The decision has no application whatever to the question of the review in this Court. However, we welcome the Commission's reference to this case, for as we show in Point I of the Petition (pp. 18-19), it is squarely in point to support our reliance upon the "benefit" principle in grade-separation matters.

The decision in *Miller v. Railroad Commission* (1937), 9 Cal.2d 190, 195, 198, 70 Pac.(2) 164, also appears not to have been fully understood by the Commission (ans. p. 46). The opinion therein declares (at p. 195):

"This decision of the Railroad Commission in matters affecting public utilities is final and conclusive *except as the same is restricted by section 67 of the Public Utilities Act*, which provides for a writ of review to this court in certain matters." (Sec. 67 of the Public



Utilities Act is now Sections 1756-1760, inc., of the Public Utilities Code.)

The other case cited by the Commission at page 46 of its answer is *Sale v. Railroad Commission*, 15 Cal.2d 612, 617, 104 P.2d 38. The language quoted by the Commission from the opinion affords no support to the Commission's contention respecting the effect of its decisions. In fact, the case involved a decision of the Commission from which no [fol. 349] appeal had been taken within the time provided in Section 67 of the Public Utilities Act; and the question discussed by the Court was as to the power of the Commission to reopen a matter, after its decision therein had been final for a year. The power of this Court on review was not even discussed.

At the risk of repetition, but as a conclusive answer to the Commission's attempt to picture this case as "re-litigation" or "retrial" of factual questions, we emphasize again that petitioner is seeking a *judicial review* of a decision as to which it asserts that federal (and state) constitutional rights have been denied. Petitioner does not ask to bring in new evidence, but does ask that the Court examine the evidence (Pet., p. 6), and exercise its *independent judgment* as to both the law and the facts, as provided by Section 1757 and 1760 of the Public Utilities Code.

### Conclusion

As indicated repeatedly in the proceedings before the Commission, in the original petition to this Court, and in the text of this reply, this petitioner does not oppose and has never opposed the construction of the Los Feliz grade separation. On the contrary, petitioner agrees with the other parties in interest, and with the Commission's indicated present position, that while no question of actual measurable hazard at the crossing is involved, nevertheless, the separation is desirable—even essential—for the rapid and uninterrupted movement of motor vehicles upon and along this major artery, and upon the nearby state highway (San Fernando Road) which parallels petitioner's own lines.

[fol. 350] But petitioner is now confronted with a decision

and order of the Commission which not only authorizes the construction, but also by separate conclusion undertakes to impose upon petitioner half of the overall cost thereof. The amount thus involved far exceeds the value of any possible or even arguable benefits that petitioner might receive, even if the contentions of the Commission (its answer, pp. 48-49) as to the sum total of these benefits were all accepted as correct.

In making this allocation the Commission (correctly) states that it has rejected the "benefit principle." It also (erroneously) states that in so doing it is supported by certain decisions of the United States Supreme Court, assertedly approving the allocation of costs of separations to the railroads involved without regard to benefit. As if to buttress its rejection of the benefit principle and its claimed reliance upon these cases, the Commission has indulged in a purely formal finding that public "safety" (as distinct from "convenience" or "necessity") justifies the separation: this although its own evidence, which it now accepts without question, shows that the actual hazard at the present grade crossing is negligible.

With equal disregard of the evidence, the Commission has also found that the proposed separation "does not concern" the nearby (federally-aided) state highway and that the State Department of Public Works is not directly involved: this although the uncontradicted evidence establishes, and the Commission admits (Ans. p. 5), that relief of congestion on the state highway is one of the principal purposes and expected benefits of the separation. The apparent intent and obvious purpose of this erroneous finding are to [fol. 351] avoid any possibility of the application here of the "benefit principle" adopted by Congress for separations involving highways built in whole or in part with federal funds; for except for that consideration, the finding would be unnecessary and immaterial.

The Commission has, moreover, committed a fundamental error of law, in that it has expressly rejected the controlling principles laid down in the *Nashville case* (*Nashville, C. and St. L. R. Co. v. Walters*, 294 U.S. 405) and there applied to reverse an attempted unconstitutional imposition of grade-separation costs of the same character as in the case at bar.

The Commission itself comments (its answer, p. 50) that the essential issue here is very simple. Concretely stated, the issue is whether the Commission, as a state agency exercising the delegated police power, may, on the one hand impose an allocation of the costs of a grade separation upon the several parties in interest determined by the mere arbitrary use of its own discretion, and without reference to or observance of any stated or discoverable standard; or must, on the other hand, allocate such costs, so far as possible, in fair proportion to the actual benefits which the parties will receive. In the case at bar the Commission has adopted the first alternative, and now insists that its discretion is supreme, immune to challenge or correction, and beyond the reach of this or any other Court. Petitioner believes that even the Commission must observe fundamental constitutional principles, and that those principles require the observance of the "benefit principle," expressed in the second alternative.

This case is of outstanding importance, from the standpoint of both the principles involved, and the very substantial interests at stake. We earnestly urge that the Court's writ should issue, so that this Court may by its own mature and considered judgment settle for this state this very important question.

Respectfully submitted, E. J. Foulds, Burton Mason,  
Randolph Karr, Attorneys for Petitioner.

January 22, 1953, San Francisco, Calif.

(Supplemental Appendix follows.)



[fol. 353]

## SUPPLEMENTAL APPENDIX

Decision No. 47819

*Before the Public Utilities Commission  
of the State of California*

Application No. 32385

In the Matter of the Application of the CITY OF GLENDALE, a municipal corporation, for an order or orders authorizing and requiring the construction of a grade separation of the crossing of Los Felix Road and the railroad of the SOUTHERN PACIFIC COMPANY, designating the portions of the work to be done respectively by said City, THE CITY OF LOS ANGELES and said railroad corporation, and allocating the cost thereof among said Cities and said railroad corporation.

Case No. 5327

In the Matter of the Investigation on the Commission's own motion as to the necessity of effecting a grade separation between the tracks of the Southern Pacific Company and Los Felix Boulevard in the Cities of Los Angeles and Glendale, County of Los Angeles, State of California and the division among the affected parties of the cost incident to such separation.

## Opinion

Pursuant to an application filed by the City of Glendale on May 7, 1951, and an Order of Investigation issued by this Commission on September 25, 1951, and, after public hearings [fol. 354] were held thereon, this Commission by Decision No. 47420, dated June 30, 1952, in Application No. 32385 and Case No. 5327, issued an order authorizing and directing the separation of grades of Los Felix Road and the tracks of the Southern Pacific Company, subject to certain specified conditions. The conditions allocated the costs of the proposed structure among the various parties concerned and designated the responsibility for maintenance of the structure when completed. Likewise, the conditions

directed the applicant city to prepare plans and specifications and submit them to this Commission and to the other interested parties within 120 days from the date of the order. Further, the construction authorized was ordered to be commenced within one year and completed within two years from the date of the order.

The City of Glendale now has petitioned for an extension of time in connection with Decision No. 47420, alleging that additional time is necessary in order to satisfactorily prepare plans and specifications, and, further, that the decision will in all probability be reviewed by the California Supreme Court. In view of these circumstances it is requested that the time be extended to permit the filing of plans and specifications within 240 days of the effective date of the order, and that, in the event a review is sought in the Supreme Court of California or in the Supreme Court of the United States, or both, the calculation of time shall commence at the date the decision becomes finally affirmed or the date a hearing is finally denied, rather than the effective date.

[fol. 355]

### Order

Petition as above entitled having been filed, the Commission being fully advised in the premises, and good cause appearing,

It Is ORDERED that Conditions 3 and 7 of Decision No. 47420, dated June 30, 1952, on Application No. 32385 and Case No. 5327, be and they hereby are cancelled, and in lieu thereof the following conditions are substituted:

3. The City of Glendale shall prepare detail plans and specifications for the construction of the grade separation, as referred to above, to carry Los Feliz Road under the tracks of Southern Pacific Company in the City of Glendale, the City of Glendale to submit said plans and specifications to the other interested parties and to the Commission for its approval within two hundred and forty (240) days from the effective date hereof. Should they fail to agree on the plans, such disagreement shall be reported to the Commission, whereupon an appropriate order will be entered.

7. The construction herein ordered shall be com-

menced within one year and completed within two years after the effective date hereof, unless further time is granted by subsequent order.

It Is FURTHER ORDERED that an additional condition be added to Decision No. 47420, *supra*, as follows:

9. In the event review is sought of this decision in either the Supreme Court of California or the Supreme Court of the United States or both, the calculation of time for compliance with the provisions of this [fol. 356] order shall commence from the date the decision becomes finally affirmed or the date a hearing is finally denied rather than the effective date hereof.

The effective date of this order shall be the date hereof.

Dated at San Francisco, California, this 14th day of October, 1952.

R. E. Mittelstaedt, President, Justus F. Craemer,  
Harold P. Huls, Kenneth Potter, Peter E. Mitchell,  
Commissioners.

[fol. 357] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA  
IN BANK

SOUTHERN PACIFIC COMPANY

vs.

PUBLIC UTILITIES COMMISSION

S.F. No. 18704

ORDER DENYING WRIT OF REVIEW—filed March 9, 1953

Petition for writ of review denied.

Edmonds, J. and Schauer, J. are of the opinion that the petition should be granted.

Gibson, Chief Justice.



[fol. 358] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL—filed March 26, 1953

To the Honorable, the Chief Justice of the Supreme Court  
of the State of California:

Southern Pacific Company, a corporation, the above-named  
petitioner, respectfully shows:

Petitioner duly filed with the Supreme Court of California its petition for a writ of review, praying said Court to issue its said writ for the purpose of determining the lawfulness of Decisions Nos. 47420 and 47597 of the Public Utilities Commission of the State of California, dated respectively July 9, 1952, and August 19, 1952, and by its said petition duly presented the federal questions with which this petition for appeal is essentially concerned.

On March 9, 1953, said Supreme Court of California rendered and entered its order, denying said petition for writ of review, and thereby adjudged and decided that said decisions of the Public Utilities Commission of the State of California are valid and lawful. The Supreme Court of California is the highest court of the State of California, and the highest court, and the only court, of said state in which a judgment in this cause could be had.

Wherefore, petitioner, considering itself aggrieved by the aforesaid final decree and judgment of the Supreme Court of California, does hereby pray that an appeal be allowed to the Supreme Court of the United States from said decree and judgment, for the correction of the errors set forth in the assignment of errors filed herewith, and hereby refers to the statement as to jurisdiction, also filed herewith, for a more complete statement of the reasons supporting the allowance of this appeal;

And petitioner further prays: that citation be issued in accordance with law; that an order be made respecting the appeal bond to be given by petitioner; that the amount of security be fixed by the order allowing the appeal; and

that the material parts of the record, proceedings and papers upon which said final judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, George L. Buland, E. J. Foulds, Burton Mason, Randolph Karr, Counsel for Petitioner.

Dated: March 20, 1953.

[fol. 360] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed March 26, 1953

Southern Pacific Company, a corporation, the above-named petitioner, having presented and filed its petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on March 9, 1953, and having presented its assignment of errors and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, and it appearing that there was drawn in question in this cause the validity of an order of the Public Utilities Commission of the State of California on the ground of its repugnance to the Constitution and laws of the United States and that the decision of this Court was in favor of its validity,

[fol. 361] Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Five Hundred Dollars (\$500.00) with good and sufficient surety, and shall be conditioned as required by law.

It is further ordered that citation shall issue in accordance with law.

It is further ordered that the Clerk of this Court shall make and transmit to the Supreme Court of the United States under his hand and seal a true copy of the material parts of the record in this cause, in accordance with the rules of the said Court in such cases made and provided.

Gibson, Chief Justice.

Dated: March 26, 1953.

---

[fol. 362] Citation in usual form on Hal F. Wiggins omitted in printing.

---

[fol. 363] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Title omitted]

ASSIGNMENT OF ERRORS—filed March 26, 1953

Southern Pacific Company, a corporation, the above named petitioner-appellant, in connection with its petition for the allowance of an appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of California in this cause, entered on March 9, 1953, assigns the following errors which it avers occurred, and upon which it will rely in prosecution of its said appeal.

The Supreme Court of the State of California erred, in and by its said judgment herein:

1. In failing to hold and conclude that those certain opinions and orders of the Public Utilities Commission of the State of California, identified respectively as said Commission's Decision No. 47420, dated June 30, 1952, and Decision No. 47597, dated August 19, 1952, insofar as said Commission has thereby undertaken to order petitioner to pay one-half of the allocable cost of the construction of the contemplated grade separation at the point where petitioner's main line of railroad crosses Los



[fol. 364] Feliz Road (Boulevard), in the City of Glendale, California, are in that respect void, invalid, and unconstitutional, in violation of the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States: because said decisions would require petitioner to contribute an amount and proportion of said cost wholly unrelated to, and greatly exceeding, the value of the benefits, or any benefits, which said petitioner will or might derive therefrom, and said decisions, if enforced, will therefore operate to deprive petitioner of its property without due process of law, and to take its said property for public use without just compensation.

2. In failing to hold and conclude that said orders, to the extent that petitioner is, or may be, compelled thereby to pay an amount and proportion of the cost of the construction of said Los Feliz grade separation, wholly unrelated to, and greatly exceeding, the value of any benefits which said petitioner may receive therefrom, will if enforced impose direct, substantial, and unreasonable financial burdens upon the interstate commerce carried on by petitioner, and impair the use and usefulness of the facilities employed by petitioner in the transportation of such commerce, in violation of the Commerce Clause (Article I, Section 8, Paragraph 3) of the Constitution of the United States, and the National Transportation Policy enacted by Congress (54 Stat. 899).

3. In failing to hold and conclude that said orders of said Commission, to the extent that they purport to require of petitioner the payment of 50 percent of the allocable cost of the construction of said Los Feliz grade separation, are not founded upon or responsive to any evidence material to the question of the apportionment of said cost, but instead bear no relation to, and are in conflict with, the unchallenged evidence, and the only evidence material to said question, of- [fol. 365] fered before or heard by said Commission in the proceedings in which its said orders were rendered; and that said orders are therefore arbitrary, in violation of the procedural standards guaranteed and required by law, and if enforced will result in depriving petitioner of its property without due process of law, in violation of the aforesaid Due-Process Clause.

4. In failing to hold and conclude that said Decision No. 47420, in that said Commission has undertaken therein to find and conclude that said proposed construction is or would be required or justified in the interest of public safety, is not founded upon or responsive to, but instead is directly in conflict with, the uncontradicted evidence, and is therefore and in said respect unreasonable and arbitrary, in contravention of the procedural standards aforesaid, and in violation of petitioner's rights guaranteed by the aforesaid Due-Process Clause.

5. In failing to hold and decide that said decisions, in that said Commission has therein found that said proposed construction does not concern a state highway, and has failed to find and conclude that said construction is and will be justified and required, if at all, essentially and primarily for the purpose of furthering the rapid and uninterrupted movement of motor-vehicle traffic upon certain major through highways, are not responsive to, but are directly in conflict with the material and uncontradicted evidence; and that said decisions are in said respects therefore arbitrary and unreasonable, in contravention of the procedural standards aforesaid, and in violation of petitioner's rights guaranteed by said Due-Process Clause.

For which errors, the above-named petitioner prays that the said judgment of the Supreme Court of the State of California, dated March 9, 1953, and said Decisions Nos. 47420 and 47597 of the Public Utilities Commission of the State of California hereinbefore referred to, be held and declared to be void, invalid, and [fol. 366] unenforceable, and therefore reversed and set aside.

Dated: March 20, 1953.

George L. Buland, E. J. Foulds, Burton Mason,  
Randolph Karr, Counsel for Petitioner.

---

[fols. 367-368] STATEMENT REQUIRED BY PARAGRAPH 2,  
RULE 12, OF THE RULES OF THE SUPREME COURT

(Omitted in printing)

[fols. 369-370]

**PROOF OF SERVICE**

(Omitted in printing)

[fols. 371-372] **AFFIDAVIT OF SERVICE BY MAIL**

(Omitted in printing)

[fols. 373-374]

**PRAECIPE**

(Omitted in printing)

[fols. 375-376] Clerk's Certificate to foregoing transcript  
omitted in printing.[fol. 377] **IN THE SUPREME COURT OF THE UNITED STATES,**  
**OCTOBER TERM, 1952****No. 739****SOUTHERN PACIFIC COMPANY, a corporation, Appellant,****vs.****PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**  
**and R. E. MITTELSTANDT, JUSTUS F. CRAEMER, HAROLD P.**  
**HULS, KENNETH POTTER and PETER E. MITCHELL, as**  
**members of and constituting said Commission, Appellees.****APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND**  
**DESIGNATION OF PARTS OF RECORD TO BE PRINTED—filed**  
**April 29, 1953.****A. Appellant adopts for its Statement of Points upon**  
**which it intends to rely in its appeal to this Court the points**  
**contained in its Assignment of Errors heretofore filed.**



B. Appellant designates the entire record, as filed [fol. 378] in the above entitled case, for printing by the Clerk of this Court.

Dated: April 27, 1953.

Southern Pacific Company, Appellant, By: George L. Buland, E. J. Foulds, Burton Mason, 65 Market Street, San Francisco 5, California, Randolph Karr, 670 Pacific Electric Bldg., Los Angeles, California, Attorneys for Appellant.

[fols. 379-381] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fols. 382-383] [File endorsement omitted]

[fol. 384] IN THE SUPREME COURT OF THE UNITED STATES,  
OCTOBER TERM, 1952

No. 739

ORDER POSTPONING JURISDICTION—May 18, 1953.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits. The case is transferred to the summary docket and assigned for argument immediately following No. 667, A. T. & S. F. Ry. Co. vs. Public Utilities Commission of California et al.